DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-133
Title: American Express Company, et al., Petitioners
v.
Italian Colors Restaurant, et al.
Docketed: July 30, 2012
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-1871-cv)
Decision Date: February 1, 2012
Rehearing Denied: May 29, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 30 2012	Petition for a writ of certiorari filed. (Response due August 29, 2012)
Aug 13 2012	Order extending time to file response to petition to and including September 28, 2012.
Aug 14 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners.
Aug 22 2012	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the respondents.
Aug 24 2012	Order further extending time to file response to petition to and including October 12, 2012.
Aug 28 2012	Brief amicus curiae of New England Legal Foundation filed.
Aug 29 2012	Brief amici curiae of Chamber of Commerce of The United States of America, et al. filed.
Aug 29 2012	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Aug 29 2012	Brief amici curiae of Marcy Cohen, et al. filed.
Oct 12 2012	Brief of respondents Italian Colors Restaurant, et al. in opposition filed.
Oct 24 2012	DISTRIBUTED for Conference of November 9, 2012.
Oct 24 2012	Reply of petitioners American Express Company, et al. filed. (Distributed)
Nov 9 2012	Petition GRANTED. Justice Sotomayor took no part in the consideration or decision of this petition.
Nov 19 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Dec 12 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Dec 18 2012	SET FOR ARGUMENT ON Wednesday, February 27, 2013
Dec 21 2012	Joint appendix filed. (Statement of costs filed)
Dec 21 2012	Brief of petitioners American Express Company, et al. filed.

Dec 27 2012	Brief amicus curiae of Equal Employment Advisory Council filed.
Dec 28 2012	Brief amicus curiae of Experian Information Solutions, Inc., et al. filed.
Dec 28 2012	Brief amici curiae of American Bankers Association, et al. filed.
Dec 28 2012	Brief amicus curiae of The Financial Services Roundtable filed.
Dec 28 2012	Brief amici curiae of Chamber of Commerce of The United States of America, et al. filed.
Dec 28 2012	Brief amicus curiae of New England Legal Foundation filed.
Dec 28 2012	Brief amici curiae of Marcy S. Cohen, et al. filed.
Dec 28 2012	Brief amici curiae of Distinguished Law Professors filed.
Dec 28 2012	Brief amicus curiae of DRI - Voice of the Defense Bar filed.
Jan 4 2013	Record from U.S.D.C. for Southern District of New York is electronic.
Jan 9 2013	Record received from the U.S.D.C. Southern District of New York. (1 box)
Jan 10 2013	CIRCULATED.
Jan 11 2013	Record from U.S.C.A. for 2nd Circuit is electronic.
Jan 22 2013	Brief of respondents Italian Colors Restaurant, et al. filed. (Distributed)
Jan 28 2013	Brief amici curiae of National Community Pharmacists Association, et al. filed. (Distributed)
Jan 29 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 29 2013	Brief amicus curiae of the United States filed. (Distributed)
Jan 29 2013	Brief amicus curiae of COSAL filed. (Distributed)
Jan 29 2013	Brief amici curiae of Ohio and 21 other states filed. (Distributed).
Jan 29 2013	Brief amici curiae of Professors of Civil Procedure filed. (Distributed)
Jan 29 2013	Brief amicus curiae of American Antitrust Institute filed. (Distributed)
Jan 29 2013	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Jan 29 2013	Brief amici curiae of Public Justice, P.C., et al. filed. (Distributed)
Jan 29 2013	Brief amici curiae of Food Marketing Institute and the National Retail Federation filed. (Distributed)
Jan 29 2013	Brief amici curiae of Professional Arbitrators and Arbitration Scholars filed. (Distributed).
Jan 29 2013	Brief amici curiae of Antitrust Scholars filed. (Distributed)
Feb 15 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Feb 15 2013	Reply of petitioners American Express Company, et al. filed. (Distributed)
Feb 27 2013	Argued. For petitioners: Michael Kellogg, Washington, D. C. For respondents: Paul D. Clement, Washington, D. C.; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEF

No. 12-___

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 30, 2012

Supreme Court Press

QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners American Express Company and American Express Travel Related Services Company, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Italian Colors Restaurant; 429 Supermarkets Corp.; Bunda Starr Corp. d/b/a Buy-Rite; Chez Noelle Restaurant Corp.; Cohen Rese Gallery, Inc.; DRF Jewelers Corp.; Il Forno, Inc.; Mai Jasmine Corp.; Mascari Enterprises d/b/a Sound Stations; Mims Enterprises, Inc. d/b/a Mims Restaurant; National Supermarkets Association Inc.; and Phoung Corp. were plaintiffs in cases consolidated before the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners American Express Company and American Express Travel Related Services Company, Inc. state the following:

American Express Company is a publicly traded company. It has no parent company; however, Berkshire Hathaway, Inc. owns more than 10 percent of its outstanding common shares. American Express Travel Related Services Company, Inc. has not issued shares to the public and is a wholly owned subsidiary of American Express Company.

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American Express Company and American Express Travel Related Services Company, Inc. (collectively, "American Express") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), this Court held that the Federal Arbitration Act ("FAA") prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures. Then, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that the FAA preempts state laws invalidating commercial arbitration agreements on the ground that they forbid class arbitration. These cases embody a straightforward principle: the FAA's overarching purpose is to require enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. Accordingly, "class arbitration, to the extent it is manufactured" by force of law rather than the product of voluntary agreement, is "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1750-51. Likewise, "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" also "creates a scheme inconsistent with the FAA," because it overrides the terms of agreements calling for bilateral rather than class arbitration. *Id.* at 1744, 1748, 1753.

The decision below flouts these basic tenets. For the third time, a panel of the Second Circuit has directed courts throughout the circuit to invalidate commercial arbitration agreements in a wide range of cases on the ground that the agreements preclude class arbitration. Specifically, in the Second Circuit,

bilateral arbitration agreements will not be enforced if the court deems a class action the "only economically feasible means" for the plaintiff to pursue its federal-law claim because the predicted costs of pursuing an individual claim, including costs that would be incurred in litigation as well as arbitration, would exceed the expected recovery. *See* App. 27a-29a.

In creating this sweeping, unwritten loophole in the FAA, the panel: (1) ignored this Court's order vacating and remanding the panel's original decision for reconsideration in light of *Stolt-Nielsen*; (2) disregarded this Court's holding in *Concepcion*, which rejected a materially indistinguishable California state-law rule that prohibited enforcement of arbitration agreements that did not permit class-wide arbitration; and (3) created a split with the Ninth Circuit, as well as the Third and Fifth Circuits. Recognizing these points, five active circuit judges voted to rehear the case *en banc*.[1]

This Court should grant certiorari because, as Judge Cabranes wrote in his separate dissent from denial of rehearing *en banc*, "the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review." App. 148a; *see also id.* ("This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.").

First, as Chief Judge Jacobs explained in his opinion dissenting from denial of rehearing *en banc*, the decision below "cannot be squared with the FAA,

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[1] Chief Judge Jacobs wrote a dissenting opinion in which Judge Cabranes and Judge Livingston joined. Judge Cabranes also wrote a separate dissenting opinion. Judge Raggi wrote a dissenting opinion in which Judge Wesley joined.

as it has been applied and explained by [this] Court." App. 136a. Given that *Concepcion* held that "the FAA preempts even state law that permits evasion of a class action waiver clause," there can be no possible "justification for permitting *precisely* the same sort of evasion as part of the 'federal substantive law of arbitrability.'" App. 143a. The panel's "labored" effort to distinguish *Concepcion* on the ground that this case implicates the "federal substantive law of arbitrability" rather than state contract law is nonsensical and evades "the broad language and clear import of *Concepcion*." *Id.*

Second, the panel's decision "splits with [the] recent holding of the Ninth Circuit" in *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), which expressly "disagree[d]" with the decision below, *id.* at 1159 n.3. App. 141a (opinion of Jacobs, J.). Also, as the panel earlier acknowledged, the decision below conflicts with two other circuits' pre-*Concepcion* decisions, which hold that an agreement providing exclusively for bilateral arbitration is enforceable unless – unlike here – there is evidence of congressional intent to preclude such arbitration in the substantive federal statute in question. *See* App. 47a (stating that it "cannot agree" with *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), and *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004)).

Third, the decision below, if left unaddressed, will abrogate the FAA's core requirement that courts enforce the intent of the parties who enter into arbitration agreements. Class-arbitration waivers are "commonly used" in commercial arbitration agreements, and the Second Circuit's "broad ruling," "in the hands of class action lawyers, can be used to

challenge virtually every . . . agreement[] with such a clause." App. 137a (Jacobs, J.). Under the panel's rule, "every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert [or other] costs would outweigh a plaintiff's individual loss." *Id.* And, given how many American businesses can be sued in the courts of the Second Circuit, the decision below will, absent review, become the *de facto* nationwide rule and make that circuit the new magnet for class-action plaintiffs seeking to evade *Concepcion* and *Stolt-Nielson*, and to circumvent mandatory commercial arbitration agreements. Indeed, the decision below is "already wo ing mischief in the district courts." App. 136a (Jacobs, J.).

Four times in three years, this Court has instructed lower courts to enforce arbitration agreements according to their terms. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671-73 (2012); *Concepcion*, 131 S. Ct. at 1745-46; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Stolt-Nielsen*, 130 S. Ct. at 1773-76. The panel in this case has repeatedly disregarded that instruction and instead held that lower courts may invalidate arbitration agreements that do not permit classwide arbitration, even where the parties have expressly agreed to waive class proceedings in favor of bilateral arbitration. This Court's review is not only warranted, but urgently required.

OPINIONS BELOW

The Second Circuit's opinion on rehearing in light of *Concepcion* (App. 1a-30a) is reported at 667 F.3d 204 ("*Amex III*"). The court's prior opinion after further consideration in light of *Stolt-Nielsen* (App. 31a-56a) is reported at 634 F.3d 187 ("*Amex II*"). The court's initial opinion (App. 57a-99a), which was vacated and remanded by this Court, is reported at 554 F.3d 300 ("*Amex I*"). The memorandum opinion and order of the district court (App. 100a-124a) is not reported (but is available at 2006 WL 662341).

JURISDICTION

The Second Circuit entered its judgment on March 8, 2011. On May 9, 2011, the panel *sua sponte* ordered supplemental briefing on the impact of *Concepcion*. On August 1, 2011, prior to the deadline for American Express's petition for certiorari,[2] the Second Circuit issued a statement that the panel was "*sua sponte* considering rehearing" in light of *Concepcion*. App. 125a-126a. As a result, under this Court's Rule 13.3, the time for American Express's petition for certiorari did not start to run until the panel's decision on rehearing. The panel issued that decision on February 1, 2012. American Express filed a timely petition for rehearing *en banc* on February 10, 2012, which was denied on May 29, 2012. App. 127a-149a. This petition is timely under Rule 13.3 because it was filed within 90 days after the denial of rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[2] On May 24, 2011, Justice Ginsburg had extended the time for filing a certiorari petition to August 5, 2011. App. 153a.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act and the Sherman Act are reproduced at App. 150a-152a.

STATEMENT

1. The named plaintiffs in these consolidated cases are retail businesses – most with annual revenues between $5 million and $40 million, *see* Pet'rs C.A. Br. 5 n.1 (Nov. 1, 2006) – that chose to accept American Express cards for purchases. Each named plaintiff entered into a written Card Acceptance Agreement (the "Agreement") with American Express that contains a provision requiring bilateral rather than class arbitration (sometimes referred to as a "class-arbitration waiver"). C.A. App. A156; *see* App. 8a-9a. The arbitration provision is "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*)." C.A. App. A156; *see* App. 67a.

The gravamen of Plaintiffs' complaint is that American Express's "Honor All Cards" policy, which requires merchants that wish to accept American Express cards to accept American Express's charge cards as well as its credit cards, constitutes an unlawful tying arrangement under § 1 of the Sherman Act.[3] The named plaintiffs seek to bring suit on behalf of "all merchants that have accepted American Express charge cards." App. 4a.

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[3] A charge card generally "requires its holder to pay the full outstanding balance at the end of a standard billing cycle," while a credit card, though it can be paid in full at the end of each billing cycle, also "allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges." App. 102a n.6.

2. American Express moved to compel arbitration. Plaintiffs did not dispute that the arbitration clause in the Agreement covers their antitrust claims. Plaintiffs argued, however, that under *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), the arbitration agreement's class-action waiver precluded them from "'effectively vindicating [their] federal statutory rights in the arbitral forum'" because each plaintiff would face "costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5,000." App. 111a (quoting *Randolph*, 531 U.S. at 90). The district court granted the motion to compel arbitration and dismissed plaintiffs' lawsuits. The court rejected plaintiffs' "prohibitive costs" argument, holding that *Randolph* related only to "*costs which would not be incurred in a judicial forum*." *Id.* Because the costs plaintiffs identified – expert and attorney's fees – would be incurred whether in court or in arbitration, the court held that they provided no basis to avoid arbitration.

3. In *Amex I*, the Second Circuit reversed. The panel concluded that the class-action waiver provision in the parties' arbitration agreement was invalid under the "federal substantive law of arbitrability" – i.e., the body of judicial decisions interpreting the FAA, § 2 of which provides that arbitration agreements "'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" App. 77a-78a (quoting 9 U.S.C. § 2).[4]

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[4] All parties agreed for purposes of this litigation that the enforceability of the arbitration agreement, including the provision requiring individual arbitration, was appropriately decided by the court, not the arbitrator. *See* App. 75a-77a.

The Second Circuit panel dismissed as inapplicable this Court's holdings that arbitration clauses are enforceable under the FAA "'"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."'" App. 81a (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), quoting in turn *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). *Gilmer*, in particular, had rejected plaintiff's argument that "'arbitration procedures cannot adequately further the purposes of the [Age Discrimination in Employment Act of 1967 ("ADEA")] because they do not provide for broad equitable relief *and class actions*.'" *Id.* (quoting *Gilmer*, 500 U.S. at 32) (emphasis added).[5] In holding *Gilmer* inapplicable, the panel acknowledged its disagreement with the Third and Fifth Circuits, which had relied on *Gilmer* in upholding arbitration agreements barring class procedures. *See* App. 82a-83a (disagreeing with *Johnson* and *Carter*).

Instead of following this Court's longstanding FAA holdings, the panel invoked *dicta* from two cases that it claimed were "somewhat closer to th[e] issue" presented. App. 84a. First, the panel construed *Randolph*'s statement that "'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum'" to license federal courts to strike down class-action waivers anytime an indi-

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[5] As *Gilmer* explained, "even if the arbitration could not go forward as a class action . . . , the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32 (internal quotations omitted; brackets in original).

vidual claimant could show that the anticipated costs of pursuing its claim would exceed the amount of its expected recovery, regardless of the fact that such costs would be incurred whether the claim proceeded in litigation or arbitration. App. 84a, 86a (quoting *Randolph*, 531 U.S. at 90).

The panel then concluded based on an affidavit by plaintiffs' paid litigation-costs expert that expert witness fees would be "at least several hundred thousand dollars, and might exceed $1 million" – far higher than the average plaintiff's anticipated recovery ($5,000). App. 89a. Moreover, the panel said, "[e]ven with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." App. 91a. The panel thus concluded that *Randolph*'s "prohibitive costs" *dicta* governed because plaintiffs' "claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." App. 93a.

Second, the panel invoked *dicta* from this Court's opinion in *Mitsubishi* suggesting that a "choice-of-law" clause that functioned as a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" might be void "against public policy." 473 U.S. at 637 n.19. The panel reasoned that provisions prohibiting class arbitration constitute such a "prospective waiver" anytime the costs of pursuing an individual claim, "whether in federal court or in arbitration," exceed the anticipated recovery for each plaintiff. App. 93a-94a. The panel thus concluded that such "prohibitive costs" constitute a "valid ground" under the "saving clause" in § 2 of the FAA "for the revocation of the [parties'] class action

waiver." App. 95a-96a (citing 9 U.S.C. § 2). After invalidating the class-action waiver, the panel remanded the matter to allow American Express the opportunity to withdraw its motion to compel arbitration. *See* App. 98a-99a.

4. This Court granted certiorari, vacated *Amex I*, and remanded for further consideration in light of *Stolt-Nielsen*. *Stolt-Nielsen* held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1773, 1775. This Court also rejected the *Stolt-Nielsen* arbitral panel's reasoning that class arbitration should be permitted as a policy matter because the "vast majority" of plaintiffs had "negative value claims" that cost more to litigate than the claimant could expect to recover – the same rationale advanced by plaintiffs here and adopted by the panel below. *Id.* at 1769 n.7 (internal quotations omitted).

5. On remand, the remaining panel members (Judges Pooler and Sack)[6] again refused to enforce the parties' arbitration agreement. The panel construed *Stolt-Nielsen* as a "narrow ruling on contractual construction" that only barred courts from using public policy to engraft a class-arbitration provision onto an otherwise "silent" arbitration agreement. According to the panel, "nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language [in an arbitration agreement] void." App. 55a. Perversely, the panel concluded that, in light of *Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties, *Amex I* had to

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[6] Justice Sotomayor was a member of the panel before her elevation to this Court.

be *broadened* to invalidate the parties' arbitration agreement in its entirety, not just the class-arbitration waiver provision. *See* App. 54a. On April 11, 2011, the court stayed its mandate pending American Express's filing of a petition for certiorari.

6. On April 27, 2011, this Court held in *Concepcion* that the FAA preempts California's *Discover Bank* rule,[7] which California courts had "frequently applied . . . to find arbitration agreements unconscionable" where they did not permit class arbitration. 131 S. Ct. at 1746. The *Discover Bank* rule provided that class-action waivers in arbitration agreements are invalid if (1) "the waiver is found in a consumer contract of adhesion"; (2) "disputes between the contracting parties predictably involve small amounts of damages"; and (3) the plaintiff alleges "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. This Court held the *Discover Bank* rule was preempted, notwithstanding the "saving clause" in § 2 of the FAA, because "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1744, 1748. *Concepcion* also specifically rejected the argument that the "prohibitive costs" facing plaintiffs with small claims could justify requiring the availability of classwide arbitration procedures as a condition for enforcing an arbitration agreement. *See id.* at 1753 (rejecting the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system").

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[7] *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

7. On February 1, 2012, after "*sua sponte* considering rehearing," App. 125a-126a, the panel held that "*Concepcion* does not alter [its] analysis." App. 3a. It narrowly construed *Concepcion* as merely "offer[ing] a path for analyzing whether a state contract law is preempted by the FAA," whereas its decision rested on "'a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). According to the panel, *Concepcion* and *Stolt-Nielsen* merely stand "for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"; they do not foreclose courts from invalidating arbitration agreements due to the absence of class-arbitration provisions. App. 16a-17a. Thus, for the third time, the panel held that arbitration agreements providing for bilateral but not class arbitration are "unenforceable" if the claimant can demonstrate that "the cost of . . . individually arbitrating their dispute . . . would be prohibitive," even though the costs at issue would be incurred whether the claim was brought in litigation or arbitration. App. 25a, 28a (internal quotations omitted). The panel reversed the district court and remanded with instructions to deny American Express's motion to compel arbitration. *See* App. 30a.

8. On May 29, 2012, the Second Circuit denied rehearing *en banc* over the dissenting votes of five circuit judges. *See supra* note 1.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CIRCUMVENTS THIS COURT'S DECISIONS MANDATING ENFORCEMENT OF ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS

A. Certiorari Is Warranted To Vindicate This Court's Decision in *Concepcion*

This Court should grant certiorari because the decision below is "incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements." App. 141a (Jacobs, J.). *Concepcion*, in particular, held that "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is impermissible under the FAA. 131 S. Ct. at 1744.

The panel nonetheless dismissed, as "tempting" but "facile," the argument that "*Concepcion* applies a fortiori here, requiring reversal of our holding in *Amex II*." App. 15a. In thus brushing aside *Concepcion*, the panel below "evad[ed] the broad language and clear import" of this Court's opinion. App. 143a. The panel gave two reasons for refusing to apply *Concepcion* as controlling precedent in this case. Neither has merit.

First, *Amex III* construed *Concepcion* as standing only "for the principle that parties cannot be *forced* to arbitrate disputes in a class-action arbitration." App. 16a-18a. In the panel's view, so long as the court does not "order[] the parties to participate in class arbitration," App. 17a, *Concepcion* is inapplicable. But *Concepcion* explicitly held that conditioning the enforceability of arbitration agreements on the availability of class arbitration frustrates the FAA's core

purposes no less than actually imposing class arbitration. *See* 131 S. Ct. at 1750 (holding *Discover Bank* preempted even though that rule "does not *require* classwide arbitration"). As the Court stated: "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration [as a condition of enforcing an arbitration agreement] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Plainly, the decision below contravenes *Concepcion*, which not only precludes rules that literally compel parties to engage in class arbitration but also forecloses the outcome the panel reached here – refusing to enforce an arbitration agreement because it does not permit classwide arbitration. *See id.* at 1744.[8]

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[8] As *Concepcion* explained, allowing plaintiffs to insist on class arbitration *ex post* frustrates the FAA's core purposes because the "fundamental" "changes brought about by the shift from bilateral arbitration to class-action arbitration" will predictably force defendants to forgo arbitration altogether. 131 S. Ct. at 1750, 1753 (internal quotations omitted). The procedural complexity necessitated by class arbitration "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Moreover, class arbitration dramatically increases the stakes without providing for any judicial review. As this Court stated: "We find it hard to believe that defendants would bet the company with no effective means of review." *Id.* at 1752. Thus, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into . . . 'in terrorem' settlements." *Id.*; *see also Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious

Second, the panel said that *Concepcion* addressed "whether a state contract law is preempted by the FAA" and did not affect the panel's "'vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). As Chief Judge Jacobs noted, that "labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded." App. 143a.

The "federal substantive law of arbitrability" invoked by the panel is merely the body of judicial precedents interpreting the FAA, including § 2, which *Concepcion* held to preempt state laws "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. If § 2 preempts the *Discover Bank* rule, the "federal substantive law of arbitrability," which is governed by that same section, cannot authorize lower federal courts to create a rule for federal claims that is materially indistinguishable from the state-law rule held preempted by § 2.[9] Thus, *Concepcion*'s holding that the FAA preempts

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claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

[9] Before *Concepcion*, the panel recognized in *Amex II* that its holding was just a "different iteration" (App. 55a) of the Second Circuit's state-law unconscionability holding in *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010), which *Concepcion* abrogated. *See Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (vacating and remanding in light of *Concepcion*); *Fensterstock v. Education Fin. Partners*, 426 F. App'x 14 (2d Cir. 2011) (summary order recognizing *Concepcion*'s abrogation of its unconscionability holding).

California's *Discover Bank* rule *necessarily* forecloses lower courts from interpreting the "federal substantive law of arbitrability" to achieve a result that is equally "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1751.

Likewise, the fact that this case involves federal rather than state-law claims does not support the panel's decision to disregard *Concepcion*. *See* App. 16a. The *Discover Bank* rule had been applied to invalidate bilateral arbitration of federal statutory claims, including Sherman Act claims. *See, e.g., In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288 (N.D. Cal. 2008). *Concepcion* categorically declared *Discover Bank* "inconsistent with the FAA," without any suggestion that its holding was contingent on the state-law nature of the Concepcions' claims. 131 S. Ct. at 1748; *see also In re Apple & AT&TM Antitrust Litig.*, No. C 07-05152 JW, 2011 WL 6018401, at *4 (N.D. Cal. Dec. 1, 2011) (rejecting plaintiffs' argument that *Concepcion* did not apply to federal antitrust claims and reversing its prior decision not to compel arbitration).

This Court, moreover, has repeatedly recognized that bilateral arbitration is wholly consistent with the enforcement of federal law, including the Sherman Act. *See, e.g., Mitsubishi*, 473 U.S. at 628-40. Indeed, just last Term, this Court reiterated that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. Accordingly, the FAA "requires courts to enforce agreements to arbitrate according to their terms . . . *even when the claims at issue are federal statutory claims*, unless the FAA's mandate has been overridden by a con-

trary congressional command." *Id.* at 669 (emphasis added; citation and internal quotations omitted).

Thus, the panel's suggestion that bilateral arbitration is inconsistent with the "vindication of [the federal] statutory rights" at issue in this case, App. 16a (internal quotations omitted), is demonstrably wrong. Congress can of course exempt any particular statute from bilateral arbitration. But it has not done so here. Not only does the Sherman Act lack any such exemption, but the Act's drafters specifically rejected "an amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs but damages would be assessed to each individually." Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 25 (1989); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).[10] Clearly, Congress did not view class actions – or class arbitrations – as necessary to the vindication of the pro-competition policies behind the Sherman Act. It is fully consistent with both the FAA and the antitrust laws to enforce an arbitration agreement that requires bilateral arbitration of plaintiffs' antitrust claims. The federal nature of those antitrust claims thus provides no justification for the panel's disregard of *Concepcion* and this Court's longstanding FAA precedents.

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[10] Instead of promoting consumer class actions, the Sherman Act's framers preferred to rely on the regulatory effects of "competitor lawsuits" and "the power of the United States government to bring suit" under § 4 of the Sherman Act. Hovenkamp, 88 Mich. L. Rev. at 26 & n.81. The Clayton Act applied the Sherman Act's private right of action to all of the antitrust laws, but it likewise did not adopt any private class enforcement mechanism. *See id.* at 27.

B. Certiorari Is Warranted To Correct the Second Circuit's Misreading of *Dicta* in *Randolph* and *Mitsubishi*

Rather than follow the plain language of the FAA and this Court's precedents, the panel below relied on "selective quotation from Supreme Court dicta" in *Randolph* and *Mitsubishi*. App. 141a (Jacobs, J.). None of those *dicta* supports the Second Circuit's sweeping new exception to the FAA. Rather, as reflected in the panel's opinion, those *dicta* have sown confusion among the lower courts and have now yielded a decision from a prominent court that sharply undercuts this Court's recent arbitration precedents.

First, the panel relied on "distortion of dicta from [*Randolph*]." App. 143a (Jacobs, J.). There, the plaintiff sought to avoid arbitration of her claim under the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. The plaintiff argued that the agreement's failure to specify which party would bear the costs of arbitration created a "risk" that she would "be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum." 531 U.S. at 89-90. This Court rejected that challenge, finding that "the arbitration agreement's silence on the subject [of costs] . . . is plainly insufficient to render it unenforceable." *Id.* at 91.

In *dicta*, *Randolph* commented that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. But the reference to "large arbitration costs" was not a reference to any and all costs, whether in arbitration or litigation. It referred to costs *unique* to arbitration – such as filing fees,

the arbitrator's fees, and other administrative fees imposed by the arbitral forum – that might be so high as to preclude *access* to the arbitral forum. *See Randolph*, 531 U.S. at 89 (referring to "the costs *of arbitration*") (emphasis added); *id.* at 90 & n.6 (referring to the "filing fee," "arbitrator's fee," and "administrative fees") (internal quotations omitted); *id.* at 93 (Ginsburg, J., concurring in part and dissenting in part) (describing the question as one of "access[]" – i.e., "who pays for the arbitral forum").

In other words, *Randolph*'s *dicta* related to the extra "price of admission" that a plaintiff has to pay a private arbitrator that would not be required to sue in court. App. 144a (Jacobs, J.).[11] It did not authorize lower courts to invalidate arbitration agreements anytime litigation costs generally, as distinguished from the specific costs of accessing an arbitral forum, would make it uneconomical to bring an individual claim. *See Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12, 13 (1st Cir. 2009) (Boudin, J.) (stating that the test is "whether the arbitration regime . . . is structured so as to *prevent* a litigant from having *access* to the arbitrator to resolve claims," and noting that "court litigation can also be expensive, but at least one does not need to pay the judge") (second emphasis added); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483-85 (D.C. Cir. 1997) (stating that arbitra-

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[11] Plaintiffs here have never contended – much less demonstrated – prohibitive *arbitration-specific* costs. *See Randolph*, 531 U.S. at 90 & n.6 (dismissing challenge because the "record d[id] not show" that plaintiff would bear excessive arbitration costs).

tion costs are of concern because "[litigants] would never be required to pay for a judge in court").[12]

The Second Circuit's unfounded expansion of *Randolph*'s *dicta* is foreclosed by *Concepcion*, "which more directly and more recently addresses the issue on appeal in this case." *Coneff*, 673 F.3d at 1159. *Concepcion* specifically rejected "prohibitive costs" as a justification for refusing to enforce bilateral arbitration agreements. In response to the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," 131 S. Ct. at 1753, the majority squarely held that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons," *id.*; *accord Stolt-Nielsen*, 130 S. Ct. at 1770 n.7 (rejecting the same policy justification for imposing class arbitration on non-consenting parties). The Court also rejected the Concepcions' argument that California's "policy against exculpation" justified the *Discover Bank* rule. 131 S. Ct. at 1746-47. Thus, as *Concepcion* makes clear, whatever the utility of the cost-spreading feature of class arbitration, it cannot justify imposing that fundamentally different procedure on parties who never agreed to it. *See also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (reject-

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[12] The panel cited a number of circuit court cases that quoted *Randolph*'s *dicta* about "prohibitive costs," but *none* of them involved costs of litigation generally. Rather, *all* of them involved arbitration-specific costs that restrict access to the arbitral forum, and found that the evidence was insufficient to warrant refusal to enforce the arbitration agreement. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *see also* App. 146a n.2 (Jacobs, J.).

ing "judicial policy concern as a source of authority" for invalidating arbitration agreements).

"Similarly misleading is the panel's quotation of *Mitsubishi*." App. 145a (Jacobs, J.). The *dicta* from *Mitsubishi* relied on by the panel addressed the hypothetical possibility that a foreign arbitral panel in that case might read the contract's choice-of-law provision to "displace American law." 473 U.S. at 637 n.19. In response, this Court said it had "no occasion to speculate on th[e] matter," because Mitsubishi sought only "to enforce the agreement to arbitrate, not to enforce an award." *Id.* The Court "merely note[d]" that if, at the award-enforcement stage, the arbitration clause and the "choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," it would refuse to enforce the agreement based on "public policy." *Id.* *Mitsubishi*'s concern was that the arbitral panel would refuse to apply U.S. substantive law to the dispute. Here, however, the parties' arbitration agreement creates no risk that the arbitrators will refuse to apply the Sherman Act to the parties' dispute. All the parties did was agree to forgo a purely *procedural* option that might be available in court (if plaintiff satisfies Federal Rule of Civil Procedure 23). Nothing in *Mitsubishi* suggests that is impermissible. To the contrary, *Mitsubishi* itself held that bilateral arbitration of antitrust claims is fully consistent with the policies underlying the federal antitrust laws. *See id.* at 638; *see also Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1265-69 (11th Cir. 2011).[13]

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[13] Moreover, this Court has clarified that *Mitsubishi*'s *dicta* do not authorize *invalidating* an arbitration agreement; rather, the choice-of-law issue is "premature" until the arbitral "'award-

In short, the Second Circuit's decision creates an expansive new exception to the FAA under which courts may routinely invalidate bilateral arbitration agreements because they do not provide for class-arbitration procedures. This Court's intervention is needed because the decision below effectively negates *Concepcion*, conflicts with longstanding FAA precedents of this Court, and frustrates the core purposes of the FAA under countless arbitration agreements nationwide.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT REGARDING THE ENFORCEABILITY OF AGREEMENTS CONTAINING CLASS-ACTION WAIVERS

This Court's intervention also is warranted because the decision below creates a circuit split with the Ninth Circuit, as well as the Third and Fifth Circuits. These differences among the circuits on an important question of federal arbitration law should now be resolved.

A. First, the decision below splits with the Ninth Circuit's decision in *Coneff*, which enforced an arbitration agreement containing a class-arbitration waiver in a case raising federal claims and expressly "disagree[d]" with *Amex III* on the ground that it is foreclosed by *Concepcion*. 673 F.3d at 1159 n.3. All three dissenting opinions from denial of rehearing *en banc* recognized this circuit split. *See* App. 141a (Jacobs, J.), 148a (Cabranes, J.), 148a-149a (Raggi, J.).

In *Coneff*, wireless customers brought a putative class-action lawsuit against AT&T Mobility ("AT&T")

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enforcement stage.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539-40 (1995) (quoting *Mitsubishi*, 473 U.S. at 638).

asserting violations of both state consumer-protection law and the federal Communications Act of 1934. *See* 673 F.3d at 1157. AT&T moved to compel arbitration as provided for by the parties' service agreement. Invoking *Randolph*, the *Coneff* plaintiffs argued that the service agreement, which contained a class-action waiver, was unenforceable because it precluded "effective vindication" of their state and federal statutory claims. *Id.* at 1158.[14] Specifically, like plaintiffs here, they argued that their claims "cannot be vindicated effectively because they are worth much less than the cost of litigating them." *Id.* at 1159.

The Ninth Circuit rejected the plaintiffs' arguments and compelled arbitration. It held that *Concepcion* "is broadly written" to preclude courts from "'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.'" *Id.* at 1158 (quoting 131 S. Ct. at 1744). Moreover, it refused to read *Randolph* as warranting an "implied exception" to *Concepcion*. *Id.* Rather, it concluded that *Randolph* is not inconsistent with *Concepcion*, and, even if it were, courts "would remain bound by *Concepcion*," because it "more directly and more recently addresses the issue on appeal." *Id.* at 1159. Finally, addressing the decision below, the Ninth Circuit stated: "To the extent that the Second Circuit's opinion is not distinguishable, we disagree with it." *Id.* at 1159 n.3; *see also Knutson v. Sirius XM Radio Inc.*, Civ. No. 12-cv-

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[14] The court assumed that *Randolph* applied to state-law claims, although it recognized that it has been applied only to cases raising federal claims. *See* 673 F.3d at 1158 n.2. The court found it unnecessary to decide the issue because the *Coneff* plaintiffs also raised a federal claim.

418 AJB (NLS), 2012 WL 1965337, at *5 (S.D. Cal. May 31, 2012) (stating that *Coneff* "rejected" the Second Circuit's "effective vindication of statutory rights" policy argument for abrogating bilateral arbitration agreements); *Jasso v. Money Mart Exp., Inc.*, No. 11-CV-5500 YGR, 2012 WL 1309171, at *7 (N.D. Cal. Apr. 13, 2012) ("to the extent that *Amex II*'s holding rested on the principle that a class waiver should be unenforceable where the amounts at issue in the claims and the expense of prosecuting the claims would effectively preclude vindication of statutory rights, that argument has been soundly rejected by the Ninth Circuit's subsequent decision in *Coneff*") (citation omitted).[15]

Two prominent circuit courts have now squarely divided over the question presented. Had this case been litigated in the Ninth Circuit, plaintiffs' challenge to the class-arbitration waiver would have

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[15] *Coneff* also suggested that *Amex III* was distinguishable because plaintiffs in *Amex III* argued that they lacked the *means* – not just the *incentive* – to pursue their claims on an individual basis. But it acknowledged that distinction was tenuous. Rightly so. As Chief Judge Jacobs recognized, *Amex III* demands not only that plaintiffs be able to recover all of their costs; it demands a "'risk-of-losing' premium." App. 138a; *see* App. 27a ("Even with respect to reasonable attorney's fees, . . the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs.") (internal quotations omitted). "This formulation betrays a dominant consideration – that, without the class-action vehicle, no lawyer will be incentivized to pursue these claims. That may be; but *Concepcion* rejected this very policy rationale." App. 138a (Jacobs, J.); *accord Jasso*, 2012 WL 1309171, at *7 ("[A]ny effort to distinguish the situation in *Amex II* . . . from *Concepcion* fails."); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048-49 (N.D. Cal. 2011) (explaining that *Amex II*'s vindication-of-rights rule applies the same "underlying rationale" as *Discover Bank*).

been rejected as inconsistent with *Concepcion*, and the parties' arbitration agreement would have been enforced. In the future, plaintiffs will predictably bring suit in the courts of the Second Circuit, rather than the Ninth, to avoid *Coneff* and this Court's holding in *Concepcion*. This Court should grant review to resolve this conflict.

B. The need for certiorari is enhanced by the panel's acknowledged disagreement with pre-*Concepcion* decisions of the Third Circuit, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), and the Fifth Circuit, in *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004). *See* App. 47a (stating that the court "cannot agree" with *Johnson* and *Carter*). The law of both of those circuits is – correctly – that class-action waivers in arbitration agreements are enforceable, irrespective of the size of the individual plaintiff's claim, unless Congress has precluded such waivers in the underlying substantive statute.

In *Johnson*, Judge Becker held that an agreement providing for bilateral arbitration was enforceable under the FAA because neither of the two federal statutes in question – TILA and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* – conferred an *unwaivable* right to a class action. 225 F.3d at 377-78. Judge Becker rooted that conclusion in a straightforward reading of *Gilmer*, which explained that "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 27, 32 (internal quotations omitted; alteration in original). Thus, although TILA and the EFTA contemplate that class actions would serve as "an important encouragement

to . . . voluntary compliance" with federal law, *Johnson*, 225 F.3d at 372 (internal quotations omitted), that social policy does not justify invalidating arbitration agreements on the basis that they lack class procedures. *Johnson* did not consider it relevant that the value of the plaintiff's claim – the amount of the plaintiff's loan – was at most $250. *See id.* at 369. As the Second Circuit panel acknowledged, *see* App. 46a-47a, 82a-83a, *Johnson* cannot be reconciled with the decision below, in either reasoning or result.[16]

Nor can the decision below be reconciled with the Fifth Circuit's decision in *Carter*, with which the panel also expressly disagreed. *See* App. 46a-47a, 82a-83a. *Carter* adopted *Johnson*'s analysis and held that agreements that contain class-arbitration waivers should be enforced absent some indication of congressional intent to preclude them. *See* 362 F.3d at 298. And, like *Johnson*, and directly contrary to the decision below, *Carter* enforced the parties' arbitration agreement without regard to the value of the plaintiff's claim relative to anticipated arbitration costs relevant to their analysis. *See id.*[17] Had this

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[16] *See also Brokers' Servs. Mktg. Group v. Cellco P'ship*, Civil Action No. 10-3973 (JAP), 2012 WL 1048423, at *4-*5 (D.N.J. Mar. 28, 2012) (stating that *Amex I* "cannot be squared with the reasoning of either the Supreme Court or the Third Circuit") (citing *Johnson* and *Concepcion*).

[17] The Seventh and Eleventh Circuits also have adopted Judge Becker's reasoning in *Johnson*. *See Livingston*, 339 F.3d at 558-59; *Randolph v. Green Tree Fin. Corp. – Alabama*, 244 F.3d 814, 818 (11th Cir. 2001), *on remand from Green Tree Fin. Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000). The Fourth Circuit's position is unclear. It has embraced a rule similar to *Amex III*, in *dicta*. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 285. But earlier precedent had followed *Johnson*. *See Adkins*, 303 F.3d at 503.

case been brought in either the Third or Fifth Circuit, the parties' arbitration agreement would have been upheld in full. This acknowledged disagreement among the circuits further supports this Court's review.[18]

III. CERTIORARI IS WARRANTED BECAUSE OF THE NATIONAL IMPORTANCE OF THE ISSUES RAISED BY THE DECISION BELOW

The question presented here is just as important as the questions this Court decided in *Stolt-Nielsen* and *Concepcion*. This Court's intervention is necessary to provide clarity and uniformity to the law, and safeguard the FAA's fundamental commitment to the enforceability of commercial arbitration agreements. This Court's review is urgent given the broad impact that the Second Circuit's decision will have on American businesses nationwide.

A. As this Court's frequent FAA decisions demonstrate, commercial arbitration agreements are vital to promoting expeditious and cost-effective resolution of a broad range of claims, including (as here) claims between businesses. The Second Circuit's decision will result in the invalidation of innumerable arbitration agreements, thus betraying the FAA's "principal purpose" to "ensure that private arbitration agree-

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[18] Like the Second Circuit, the First Circuit has also invalidated a class-arbitration waiver without any indication of congressional intent to do so. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (invalidating class-arbitration waiver despite acknowledging that the "arbitration agreements' class mechanism prohibition is *not* in direct conflict with the relevant antitrust statutes, state and federal, which do not mention class actions"). *Kristian*, like *Amex III*, cannot be squared with either *Johnson* or *Carter*.

ments are enforced according to their terms." *Concepcion*, 131 S. Ct. at 1748 (internal quotations and alteration omitted).

Amex III directs courts to invalidate bilateral arbitration agreements anytime they decide that "the damages due to any single individual or entity are too small to justify bringing an individual action." App. 18a. The breadth of that rule is illustrated by this case. The panel below reasoned that plaintiffs' individual claims were economically infeasible absent a class action because each plaintiff's expected recovery would not exceed *several hundred thousand* dollars or even *$1 million*. *See* App. 14a. Such high costs are not unique to antitrust claims; many other claims involve "an expensive and protracted process." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality op.). Thus, the panel's expansive test will predictably lead to abrogation of bilateral arbitration agreements for a large number of claims. *See also Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 551-52 (S.D.N.Y. 2011) (invalidating class-arbitration waiver based on anticipated litigation costs of $200,000 for a wage-and-overtime claim).

The decision below is potentially even broader than the *Discover Bank* rule. *Discover Bank* was limited to "small" claims – a limitation this Court called "toothless and malleable," noting with evident disapproval that one court had deemed a claim for $4,000 "small" enough to qualify. *Concepcion*, 131 S. Ct. at 1750. Here, even an individual antitrust claim asserting several hundred thousand dollars in damages would, according to the panel, not be "economically feasible" given expert costs of up to $1 million. App. 27a. Moreover, *Concepcion* held the *Discover*

Bank rule preempted even though it was, by its terms, limited to circumstances: (1) where "'the waiver is found in a consumer contract of adhesion'"; and (2) "'when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'" 131 S. Ct. at 1746 (quoting *Discover Bank*, 113 P.3d at 1110). *Amex III*, by contrast, contains no such limiting terms and applies to "*any* individual plaintiff" (not just consumers) asserting *any* type of claim (not just deliberate fraud). App. 97a. Indeed, plaintiffs here would not satisfy *Discover Bank* because, among other things, they are not consumers but rather retail businesses – most with significant annual revenues. Given that *Amex III* calls for the invalidation of even more arbitration agreements than the *Discover Bank* rule, it is even more clearly "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1750-51.

B. The decision below also undermines the key benefits of *all* arbitration agreements – even those that withstand challenge – by turning the threshold arbitrability question into a detailed inquiry into the merits, which will increase costs and delay and inject enormous uncertainty into parties' expectations regarding the process for dispute resolution. Under the decision below, any arbitration in which plaintiffs seek class treatment will be subject to protracted proceedings in district court and "be litigated there on the merits in many critical respects." App. 139a (Jacobs, J.). As Chief Judge Jacobs recognized, the "economic feasibility" of an individual claim cannot be assessed "[w]ithout a close inquiry into the merits" of the claim. *Id.* For example, "[w]hether a dispute may require expert testimony is a question

inseparable from the merits (and raises *Daubert* and other vexed questions)." *Id.* Nor can the feasibility of a claim be assessed without delving into "such prior questions as the statute of limitations and laches, controlling law, [and] res judicata, . . . not to mention . . . whether the putative class is duly constituted and properly represented, without which there is no class claim." *Id.* Thus,

> [e]ven if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. . . . The predictable upshot is that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes.

App. 139a-140a.

C. Finally, the conflict created by the panel's decision will "encourage and reward forum shopping." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). After *Discover Bank* was decided, for example, forum-shopping plaintiffs successfully brought claims on behalf of non-California residents in California federal court, to evade binding arbitration. *See, e.g., Masters v. DirecTV, Inc.*, Nos. 08-55825 & 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009) (unpublished) (applying California law to a "nationwide class action"). Some of the plaintiffs in this very case tried to engage in forum shopping by filing their cases in California, before their cases were transferred to the court below.[19] The decision below will create even

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[19] *See* Order at 6, *Italian Colors Restaurant v. American Express Co.*, No. C 03-3719 SI (N.D. Cal. Nov. 7, 2003) (transferring the *Italian Colors* case to the Southern District of New York and concluding that the plaintiffs had engaged in improper "forum shopping") (C.A. App. A19).

greater incentives for forum shopping than *Discover Bank*, because it rests on *federal* law. Thus, any putative class action brought in the courts of the Second Circuit will be subject to that decision, irrespective of the plaintiffs' States of residence and irrespective of the parties' contractual choice-of-law provisions. As a result, the decision below will make the Second Circuit the forum of choice for class-action plaintiffs seeking to avoid the terms of valid, binding arbitration agreements.

The importance of this Court's review is bolstered by the number of corporations that plaintiffs can sue in the courts of the Second Circuit. New York is the hub of numerous major U.S. and global industries, including the banking and financial services, insurance, real estate, and media and advertising industries. One in ten Fortune 500 companies is headquartered there. *See* http://money.cnn.com/magazines/fortune/fortune500/2012/states/NY.html. An even larger number of companies do business and are therefore subject to jurisdiction there. Given the ease with which corporations can be haled into court in the Second Circuit, and the new incentive for plaintiffs to bring putative class-action suits there, the Second Circuit's rule will, if unreviewed, become the *de facto* nationwide rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 30, 2012

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
Plaintiffs-Appellants,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
Defendants-Appellees.[1]

Argued: Dec. 10, 2007

Decided: Feb. 1, 2012

POOLER and SACK, *Circuit Judges*.[2]

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[1] The Clerk of the Court is directed to amend the official caption as shown above.

[2] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The remaining two panel members, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Second Circuit IOP E(b), available at http://www.ca2.uscourts.

POOLER, *Circuit Judge*:

We turn to this case for the third time, as the Supreme Court released its latest views on class arbitration waivers in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), just weeks after we issued our decision in *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011) ("*Amex II*"). *Amex II* returned to us from the Supreme Court, after defendants American Express Company and American Express Travel Related Services Co. (together, "Amex") sought review from the Supreme Court following our decision in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) ("*Amex I*"). In *Amex I*, we considered the enforcement of a mandatory arbitration clause in a commercial contract also containing a "class action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. We found the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." *Amex I*, 554 F.3d at 304.

The Supreme Court granted Amex's petition for a writ for certiorari, then vacated and remanded for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). Finding our original analysis unaffected by *Stolt-Nielsen*, we again reversed the district court's decision and remanded for further proceedings. *Amex II*, 634 F.3d at 199-200. On April 11, 2001, we placed a hold on the mandate in *Amex II* in order for

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gov/clerk/Rules/IOP/IOP_E.htm; *United States v. DeSimone*, 140 F.3d 457, 458-59 (2d Cir. 1998).

Amex to file a petition seeking a writ of certiorari. While the mandate was on hold, the Supreme Court issued its decision in *Concepcion*, 131 S. Ct. 1740 (2011). The *Concepcion* Court held that the Federal Arbitration Act preempted a California law barring the enforcement of class action waivers in consumer contracts. *Id.* at 1750-51. The parties submitted supplemental briefing discussing the impact, if any, of *Concepcion* on our previous decisions, and we find oral argument unnecessary. As discussed below, *Concepcion* does not alter our analysis, and we again reverse the district court's decision and remand for further proceedings.

BACKGROUND

Because the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, we provide but a brief recitation of the facts.

A. Procedural Posture.

The plaintiffs appealed from the March 20, 2006 judgment of the United States District Court for the Southern District of New York, which granted Amex's motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and Federal Rule of Civil Procedure 12(b). *See In re Am. Express Merchs. Litig.*, No. 03 CV 9592, 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006) (Daniels, *J.*).

B. The Parties.

The amended complaint alleges that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to mer-

chants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets."

The named plaintiffs seek to represent the following class:

> all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States. . . .

C. The Plaintiffs' Substantive Claims.

The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards."[3] The district court explained the distinction:

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

In re Am. Express Merchs., 2006 WL 662341, at *1, n. 6.

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[3] Plaintiffs bring claims pursuant to both the Sherman and Clayton Acts, 15 U.S.C. § 1 et seq., which bar certain anti-competitive conduct in trade.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card." Thus, the holder of a charge card is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs.

As a result of this distinction, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each purchase made with its card at the merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, MasterCard, and Discover. Over the last decade, the plaintiffs allege, Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." By leveraging its market power in corporate and personal charge cards, however, plaintiffs allege that American Express was able to compel merchants to accept "its new revolving credit card product[s] at the same elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained

in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies:

> to your acceptance of American Express© Cards .... American Express Card(s) ... shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[4]

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[4] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). A tying arrangement will violate Section 1 of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462 (1992) (internal quotation marks omitted).

D. The Card Acceptance Agreement.

The basic contractual relationship between Amex and the plaintiffs was set forth in an affidavit of an Amex executive:

> American Express issues card products to its cardmembers, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be governed by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right:

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.
>
> . . .
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the following provision contained in the Agreement:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU

> NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM. . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

(emphasis in the original). The Card Acceptance Agreement thus not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis.

E. The District Court's Decision.

Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 16, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration

clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re Am. Express Merchs. Litig.*, 2006 WL 662341, at *4. The district court also held that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration. Having so decided, the district court dismissed plaintiffs' cases against Amex. *Id.* at *10.

F. Our Original Decision, *Amex I*.

The plaintiffs filed a timely appeal. We first decided that the issue of the class action waiver's enforceability was a matter for the court, not the arbitrator. *Amex I*, 554 F.3d at 310. Neither party takes issue with that holding, which we find survives *Stolt-Nielsen* and *Concepion*.

Turning to the question of whether the class action waiver in the Card Acceptance Agreement was enforceable, we found that *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), controlled our analysis:

> to the extent that [*Green Tree*] holds that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S. Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden

> because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Merchants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver. The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

Amex I, 554 F.3d at 315-16. Based in part on plaintiffs' submission of an affidavit from an economist detailing the fiscal impracticality of pursuing individual claims, we concluded that:

> [since] Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

Id. at 319. Thus, we held that:

> the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because

> to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the [Federal Arbitration Act], 9 U.S.C. § 2, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

Id. at 320. Amex timely filed a petition for a writ of certiorari. *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010). The Supreme Court granted Amex's petition, vacated our original decision, and remanded for further consideration in light of its holding in *Stolt-Nielsen*.

G. The *Stolt-Nielsen* Decision.

In *Stolt-Nielsen*, petitioners were shipping companies. *See* 130 S. Ct. at 1764. The charter party – a maritime contract governing the relationship between the parties – provided, in relevant part

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [i.e., the FAA],

> and a judgment of the Court shall be entered upon any award made by said arbitrator.

Id. at 1765. Respondent AnimalFeeds, along with other charterers, sued Stolt-Nielsen, alleging price fixing, and eventually served a demand for class arbitration. *Id.* The parties agreed to have an arbitration panel decide the threshold issue of whether the charter party permitted class arbitration, and stipulated before the panel that the arbitration clause was silent on the issue of class arbitration. *Id.* at 1765-66. The panel concluded that the expert testimony offered did not demonstrate an "inten[t] to preclude class arbitration." *Id.* (alteration in original). After finding that the issue was controlled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the panel concluded *Bazzle* and policy considerations dictated finding the clause permitted class arbitration. *Id.*

The Supreme Court found that the arbitration panel "imposed its own policy choice," rather than "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "thus exceeded its powers." 130 S. Ct. at 1770. Tackling the issue itself, the Court found the FAA controlling, *id.* at 1773, and reaffirmed that "arbitration is simply a matter of contract between the parties." *Id.* at 1774 (alterations omitted). The Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in the original).

H. Our Decision in *Amex II*.

On remand from the Supreme Court, we found *Stolt-Nielsen* did not require us to depart from our

original analysis. The key issue, we concluded, was whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex. *In re American Express Merchants' Litigation*, 634 F.3d 187, 196 (2d Cir. 2011). We concluded enforcement of the class action waiver would indeed bar plaintiffs from pursuing their statutory claims because the "record evidence before us establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 197-98.

We relied on detailed testimony from Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French submitted a detailed affidavit to the district court, in which he opined, inter alia, that "[i]n my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million . . . after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range . . . ." (Joint Appendix at p. 362-63, ¶ 4). Dr. French then opined that it was not economically rational to pursue an individual action against Amex in light of these substantial expert witness costs. (Joint Appendix at p. 365, ¶ 10-11). *Amex II*, 634 F.3d at 198. We found that "Dr. French's affidavit demonstrates that the only economically feasible means for enforcing their

statutory rights is via a class action," and remanded the case to the district court. *Id.*

ANALYSIS

Shortly after we issued our opinion in *Amex II*, the Supreme Court handed down its opinion in *Concepcion*, 131 S. Ct. at 1740. In *Concepcion*, the Supreme Court held that the FAA preempted California common law deeming most class-action arbitration waivers in consumer contracts unconscionable. *Id.* at 1746. Amex argues that *Concepcion* applies a fortiori here, requiring reversal of our holding in *Amex II*. It is tempting to give both *Concepcion* and *Stolt-Nielsen* such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But a careful reading of the cases demonstrates that neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.

The specific preemption question addressed by the Supreme Court in *Concepcion* was "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744. Under California's common law, class action waivers contained in arbitration clauses were regularly found unconscionable, especially in consumer contracts. *Id.* at 1746. The Supreme Court began its analysis by reaffirming the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 1749 (internal quotation marks). By requiring the "availability of classwide arbitration," the Court held,

the California rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 1748. In response to the dissent's discussion of the benefits of class-arbitration as a means of addressing multiple small claims, the majority concluded that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

Concepcion plainly offers a path for analyzing whether a state contract law is preempted by the FAA. Here, however, our holding rests squarely on "a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." *Amex I*, 554 F.3d at 320; *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir. 2006) (severing as unenforceable provision of arbitration agreement limiting availability of treble damages under anti-trust statute); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (severing restriction on available remedies from arbitration agreement after finding that "ban on punitive and exemplary damages is un-enforceable in a Title VII case"); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable" and language insulating employer from damages and equitable relief rendered clause unenforceable).

Concepcion and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration. *Concepcion*, 131 S. Ct. at 1750-51 ("class arbitration, to the extent it is manufactured by [state

law] rather than consensual, is inconsistent with the FAA")[5]; *Stolt-Nielsen*, 130 S. Ct. at 1775 ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."). We plainly acknowledged in *Amex II* that we could not, and thus were not, ordering the parties to participate in class arbitration. 634 F.3d at 200 ("*Stolt-Nielsen* plainly precludes us from ordering class-wide arbitration.").

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[5] In *Compucredit Corp. v. Greenwood*, 10-948, – S.Ct. –, 2012 WL 43517 (Jan. 10, 2012), the Supreme Court addressed whether the Credit Repair Organizations Act, 15 U.S.C. § 1679, et seq., precluded enforcement of an arbitration agreement. The Court concluded that because the Act is silent on whether claims brought under the Act can be arbitrated, the FAA requires that the arbitration agreement be enforced according to its terms. *Id.* at *4-*6. To support its analysis, the Court cited to a number of statutes that "restrict[] the use of arbitration." *Id.* Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions, but instead argue that enforcement of the class arbitration waiver would effectively deprive them of their ability to vindicate their statutory rights.

As aptly noted by Justice Sotomayor's concurrence in *Compucredit*, the majority's opinion does not "hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims." *Id.* at *8. Indeed, the Supreme Court has "on numerous occasions . . . held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question." *Id.* at *8. Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute.

What *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed per se enforceable. That leaves open the question presented on this appeal: whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims. While we cannot rely on *Concepcion* or *Stolt-Nielsen* to answer the question before us, we continue to find useful guidance in other Supreme Court decisions addressing the issue of vindicating federal statutory rights via arbitration.

We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974). As the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a

solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise . . . [, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.") (footnote omitted); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis omitted)).

Arbitration is also recognized as an effective vehicle for vindicating statutory rights, but only "so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) (emphasis added). Indeed, in dicta the *Mitsubishi* Court noted that should clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637, n.19. As we observed in *Amex II*:

> While dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the

> public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96 cv 3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997) ("GFI could not have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

634 F.3d at 197.

Applying its rule regarding the arbitrability of federal statutory claims from *Mitsubishi*, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court permitted the arbitration, rather than litigation, of a plaintiff's Age Discrimination in Employment Act claim. *Id.* at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637). In *Gilmer*, the Court concluded that the plaintiff in that case could effectively vindicate his asserted rights in the arbitral forum. The plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23. After the plaintiff filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rule of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24. The *Gilmer* Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause

was enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

The Court rejected plaintiff's contention that "arbitration procedures cannot further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32. Rather, the Court found that:

> arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).[6]

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[6] The Amex plaintiffs do not proffer the argument rejected in *Gilmer* – namely, that the class action waiver in the Card Acceptance Agreement is enforceable because the relevant statute allows class actions. "Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity." *Amex II*, 634 F.3d at 196.

Gilmer's conclusion that where the plaintiff's statutory rights could effectively be vindicated through arbitration does not affect the case before us, because here plaintiffs have demonstrated that their statutory rights cannot be vindicated through individual arbitrations. Nearly a decade after *Gilmer*, in *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court acknowledged in dicta "that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Among the costs at issue were "payment of filing fees, arbitrators' costs, and other arbitration expenses." *Id.* at 84. In the end, the *Green Tree* Court found plaintiff failed to submit sufficient evidence to demonstrate the costs of arbitration would effectively prohibit her from vindicating her statutory rights, dooming her attempt to have the arbitration clause declared unenforceable:

> It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a

> matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.

Id. at 91-92.

As the Tenth Circuit explained:

> Thus, *Gilmer* reaffirmed the Arbitration Act's presumption in favor of enforcing agreements to arbitrate – even where those agreements cover statutory claims. While we recognize this presumption, we conclude that it is not without limits. As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) (citations omitted); *see also Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) ("We do not read *Gilmer* as mandating enforcement of all mandatory agreements to arbitrate statutory claims; rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.")

Neither *Stolt-Nielsen* nor *Concepcion* overrules *Mitsubishi*, and neither makes mention of *Green Tree*. We continue to find *Green Tree* "controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *Amex II*, 634 F.3d at 197 (quoting *Green Tree*, 531 U.S. at 92). Other Circuits permit plaintiffs to challenge class-action waivers on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right. *See, e.g.*, *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.") (citation omitted); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("In the present case, the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("[Lead plaintiff] makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff."). In each of these cases, plaintiffs' attempts to avoid the waiver clause failed because plaintiffs were unable to demonstrate the class-action waivers barred them from vindicating their statutory rights. Their failures speak to the quality of the evidence presented, not the viability of

the legal theory. The fact that plaintiffs so often fail in their attempts to overturn such waivers demonstrates that the evidentiary record necessary to avoid a class-action arbitration waiver is not easily assembled, and that the courts are capable of the scrutiny such arguments require.

Thus, we continue to find *Green Tree* "controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *Amex I*, 554 F.3d at 315 (quoting *Green Tree*, 531 U.S. at 92). Since there is no indication in *Stolt-Nielsen* or *Concepcion* that the Supreme Court intended to overturn either *Green Tree* or *Mitsubishi*, both cases retain their binding authority. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws. Dr. French stated that the purpose of his affidavit was "to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to "provide my opinion as to whether it would be economically rational for such a merchant

to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." (Joint Appendix, at p. 362, ¶ 4)

Dr. French continued:

> In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.

(Joint Appendix at p. 362-63, ¶ 4) Dr. French then considered the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled. . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

(Joint Appendix at p. 365, ¶ 10-11)

Dr. French's affidavit demonstrates that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action. As discussed in our earlier opinion, the district court did not directly address Dr. French's affidavit, focusing instead on the damages provision of the Clayton Act, 15 U.S.C. § 15(a). *See Amex I*, 554 F.3d at 317. We found that while the Clayton Act does provide for treble awards along with the recovery of attorneys' fees and expenses, that was unlikely to assist plaintiffs where, as here, "the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case." *Id.* We also found the Clayton Act's fee-shifting provisions inadequate to alleviate our concerns given the low expert witness reimbursement rate. *Id.* at 318. "Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *Id.*

We again find "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." *Amex I*, 554 F.3d at 319. The "enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express['s] tying arrangements under the federal antitrust laws.'" *Id.* Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. *See*

Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 Antitrust L.J. 1501, 1506 (1980) (discussing private, class action antitrust lawsuits and observing that "it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable. We again emphasize our holding comes with caveats. *See Amex I*, 554 F.3d at 320 ("We emphasize two important limitations upon our holding.") Our decision in no way relies upon the status of plaintiffs as "small" merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights. *See, e.g., Raniere v. Citigroup, Inc.*, No. 11 Civ. 2248, 2011 WL 5881926, at *13 (S.D.N.Y. Nov. 22, 2011) ("even if *AT & T* is read broadly to acquiesce to the enforcement of an arbitral agreement that as a practical matter would prevent the vindication of state rights in the name of furthering the strong federal policy favoring arbitration, that would not alter the validity of the federal statutory rights analysis articulated in *Mitsubishi*, *Green Tree* [and] *American Express*"); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 CIV 6950, 2011 WL 2671813, at *2-5 (S.D.N.Y. July 7, 2011) (declining to apply *Concepcion* where the question before the court involved the plaintiff's ability to vindicate a federal

statutory right); *Sutherland v. Ernst & Young, LLP*, 768 F. Supp. 2d 547, 550-55 (S.D.N.Y. 2011) (finding *Amex I* "retains its persuasive force" following *Stolt-Nielsen*).

We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather, as demonstrated by the different outcomes in our sister Circuits, we hold that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

Our earlier opinion refrained from ordering the parties to submit to class arbitration, instead permitting Amex the choice between arbitration and litigation. *Amex I*, 554 F.3d at 321. *Stolt-Nielsen* plainly precludes any court from compelling the parties to submit to class-wide arbitration where the arbitration clause is silent as to class-wide arbitration. 130 S.Ct. at 1775 (a party does not agree "to submit to class arbitration unless there is a contractual basis for concluding that a party agreed to do so").

Which leads to the issue of how to proceed from here. As detailed above, we are persuaded by the record before us that if plaintiffs cannot pursue their allegations of antitrust law violations as a class, it is financially impossible for the plaintiffs to seek to vindicate their federal statutory rights. Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all. If they are not permitted to pro-

ceed in a judicial class action, then, they will have been effectively deprived of the protection of the federal antitrust-law. The defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration, irrespective of whether or not the provision explicitly prohibits class arbitration.

Therefore, in light of the fact that the arbitration provision at issue here does not allow for class arbitration, under *Stolt–Nielsen* and by its terms, if the provision were enforced it would strip the plaintiffs of rights accorded them by statute. We conclude that this arbitration clause is unenforceable. We remand to the district court with the instruction to deny the defendant's motion to compel arbitration.

CONCLUSION

For the reasons given above, the decision of the district court is reversed. We remand to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
Plaintiffs-Appellants,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
Defendants-Appellees.

Argued: Dec. 10, 2007

Decided: Mar. 8, 2011

Before: POOLER and SACK, Circuit Judges.[1]

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[1] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The remaining two panel members, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Second Circuit Internal Operating Procedure E(b); *United States v. DeSimone*, 140 F.3d 457, 458-59 (2d Cir.1998).

POOLER, Circuit Judge:

This case returns to us from the Supreme Court. Defendants American Express Company and American Express Travel Related Services Company Inc. (together, "Amex") sought review from the Supreme Court following our decision in *In re American Express Merchants Litigation*, 554 F.3d 300 (2d Cir.2009). There, we considered the enforcement of a mandatory arbitration clause in a commercial contract also containing a "class action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. We found the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." *In re Am. Express*, 554 F.3d at 304.

On May 3, 2010, the Supreme Court granted Amex's writ for certiorari, vacating and remanding for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, —— U.S. ——, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). The parties submitted supplemental briefing discussing the impact, if any, of *Stolt-Nielsen* on our original decision, and we find no need for oral argument. Finding our original analysis unaffected by *Stolt-Nielsen*, we again reverse the district court's decision and remand for further proceedings, as discussed below.

BACKGROUND

Because the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, we provide but a brief recitation of the facts.

A. Procedural Posture. The plaintiffs appealed from the March 20, 2006 judgment of the United States District Court of the Southern District of New York, which granted Amex's motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and Fed.R.Civ.P. 12(b). *See In re Am. Express Merchs. Litig.*, No. 03 cv 9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006) (Daniels, J.).

A. The Parties. The amended complaint alleges that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets."

The named plaintiffs seek to represent the following class:

> all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . . .

C. The Card Acceptance Agreement. The basic contractual relationship between Amex and the plaintiffs was set forth in an affidavit of an Amex executive:

> American Express issues card products to its card-members, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be governed by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right:

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting

from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.

* * *

Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the following provision contained in the Agreement:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PAR-

> TICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

The Card Acceptance Agreement thus not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis.

D. The District Court's Decision. Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 16, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re Am. Express Merchs. Litig.*, 2006 WL 662341, at *4. The district court also held

that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration. Having so decided, the district court dismissed plaintiffs' cases against Amex. *Id.* at *10.

E. Our Original Decision, *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir.2009). The plaintiffs filed a timely appeal. We first decided that the issue of the class action waiver's enforceability was a matter for the court, not the arbitrator. *Id.* at 310. Neither party takes issue with that holding, which we find survives *Stolt-Nielsen*.

We then turned to the question of whether the class action waiver in the Card Acceptance Agreement was enforceable. We found that *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), controlled our analysis:

> to the extent that it holds that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S.Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Mer-*

> *chants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver. The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

In re Am. Express, 554 F.3d at 315-16. Based in part on plaintiffs' submission of an affidavit from an economist detailing the fiscal impracticality of pursuing individual claims, we concluded that:

> Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Id. at 319. Thus, we held that:

> the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plain-

> tiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the [Federal Arbitration Act], 9 U.S.C. § 2, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

Id. at 320. Amex timely filed a petition for certiorari. *Am. Exp. Co. v. Italian Colors Restaurant*, —— U.S. ——, 130 S.Ct. 2401, 176 L.Ed.2d 920 (2010). The Supreme Court granted Amex's petition, vacated our original decision, and remanded for further consideration in light of its holding in *Stolt-Nielsen*. The parties submitted supplemental briefing, and we find no need for further oral argument.

ANALYSIS

As this case was returned to us to consider the applicability of *Stolt-Nielsen*, that is where we begin. In *Stolt-Nielsen*, petitioners were shipping companies. *Stolt-Nielsen*, 130 S.Ct. at 1764. Shipping company customers, including AnimalFeeds International Corp., ship their "goods pursuant to a standard contract known in the maritime trade as a charter party." *Id.* There are "[n]umerous charter parties in use and charterers like AnimalFeeds, or their agents – not the shipowners – typically select the charter party that governs their shipments." *Id.* at 1764-65. AnimalFeeds shipped its goods pursuant to a charter party that provided in relevant part:

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator,

> who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedures of the United States Arbitration Act [i.e., the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

Id. at 1765 (internal quotation omitted).

AnimalFeeds, along with other charterers, sued Stolt-Nielsen, alleging illegal price fixing. As a result of various court decisions, AnimalFeeds and Stolt-Nielsen were required to arbitrate their antitrust dispute. *Id.* AnimalFeeds served a demand for class arbitration. *Id.* The parties agreed to have an arbitration panel decide the threshold issue of whether the charter party permitted class arbitration, and stipulated before the panel that the arbitration clause was silent on the issue of class arbitration. *Id.* at 1765-66. The arbitration panel heard evidence and argument, including testimony from Stolt-Nielsen's experts regarding arbitration customs and usage in the maritime trade. *Id.* at 1766. The panel concluded that the expert testimony offered did not demonstrate an "inten[t] to preclude class arbitration." *Id.* (bracket in original). After finding that the issue was controlled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the panel concluded *Bazzle* and policy considerations dictated finding the clause permitted class arbitration. *Id.*

Stolt-Nielsen sought to vacate the arbitration award in the United States District Court for the Southern District of New York. *Stolt-Nielsen SA v. Animal-*

Feeds Int'l Corp., 435 F.Supp.2d 382 (S.D.N.Y.2006). The district court found the arbitration panel's decision was made in "manifest disregard" of the law. The district court found *Bazzle* controlling only to the extent that the decision about class arbitrability was one for the arbitration panel to decide, and that *Bazzle* did not speak to the issue of whether the clause permitted class arbitration. *Id.* at 384-85. The district court also found that if the panel had undertaken a "meaningful" choice of law analysis, it would have concluded that maritime and New York state law applied. *Id.* at 385. The Court then concluded that the clause precluded class arbitration. *Id.* at 386.

On appeal, our Court reversed. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir.2008). Noting that at oral argument counsel for Stolt-Nielsen conceded that the issue was one of first impression, we concluded that the relevant maritime and state law was inconclusive on the issue. *Id.* at 98. In the absence of a clear maritime or state rule on the issue, we found that the arbitration panel could not have been in manifest disregard of the law. *Id.* at 98–100.

The Supreme Court reversed. *Stolt-Nielsen*, 130 S.Ct. at 1768-73. The Court found that the arbitration panel "imposed its own policy choice," rather than "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "thus exceeded its powers." *Id.* at 1770. Tackling the issue itself, the Court found the FAA controlling, *id.* at 1773, and reaffirmed that "arbitration is simply a matter of contract between the parties." *Id.* at 1774 (emphasis and brackets omitted). The Court continued:

> It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.

Id. at 1774-75. Applying those principles to the case before it, the Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in the original).

Amex urges that our decision cannot stand in the wake of *Stolt-Nielsen*, reading the decision as "repeatedly emphasiz[ing] courts' obligation to faithfully *enforce* (not just construe) the parties' arbitration agreement." (Amex. Supp. Reply Br. at 1) Amex argues that:

> *Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties cannot be reconciled with appellants' contention that courts can invalidate the parties' agreement . . . based on the absence of class procedures.

(Amex Supp. Reply Br. at 2) We disagree. *Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is per se enforceable. Indeed, our prior holding focused not on whether the plaintiffs' contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.

Section 2 of the FAA, 9 U.S.C. § 2, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As "the primary substantive provision," Section 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" FAA. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In our previous opinion, we jointed [sic] other Circuits that evaluate the enforceability of the class action waivers under the federal substantive law of arbitrability. *See Gay v. CreditInform*, 511 F.3d 369, 394-95 (3d Cir.2007) (holding class action waiver to be enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir.2006) ("Although Plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . .").

Class action lawsuits are well-recognized by the Supreme Court as a vehicle for vindicating statutory rights. This is especially true with respect to the Court's recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Thus, as the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004) ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis omitted)).

The Court addressed the use of class actions as a vehicle for vindicating statutory rights in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). *Gilmer* involved a claim under the Age Discrimination in Employment

Act ("ADEA"), 29 U.S.C. § 621 et seq. Specifically, the plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23, 111 S.Ct. 1647. After the plaintiff had filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rules of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24, 111 S.Ct. 1647. The *Gilmer* Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26, 111 S.Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Even though the Court acknowledged that "the ADEA is designed not only to address individual grievances, but also to further important social policies," *id.* at 27, 111 S.Ct. 1647, it discerned no Congressional intent to preclude ADEA claims from being subject to arbitration. The Court also considered the plaintiff's argument to the effect "that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32, 111 S.Ct. 1647. The Court rejected this contention, finding that:

> arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide

> for collective proceedings. But even if the arbitration could not go forward as a class action or cl[illegible]s relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).

The Third Circuit, among others, relied on the final sentence of this passage to uphold a mandatory arbitration clause. *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir.2000), dealt with a claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. The plaintiffs argued that their class action claim in federal court was not subject to mandatory arbitration because TILA:

> effectively create[s] an unwaivable right to bring a class action . . . [In TILA,] Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims.

Id. at 377.

The Third Circuit held that "[t]his argument is unavailing in light of" *Gilmer*. *Id.* The court noted that *Gilmer* involved a claim under the ADEA, a statute which explicitly provides in its text for the bringing of class actions. *Id.* (citing 29 U.S.C. § 626(b)). In

spite of this, the court concluded, "the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the class action remedy there." *Id.*; *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) ("[W]e reject the [plaintiffs'] claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the [Fair Labor Standards Act.] The Supreme Court rejected similar arguments concerning the ADEA in *Gilmer* . . . .").

We cannot agree with this view of *Gilmer* because a collective and perhaps a class action remedy was, in fact, available in that case. As set forth above, the Supreme Court explicitly noted that the arbitration rules of the NYSE provided for the conduct of collective arbitration. *Gilmer*, 500 U.S. at 32, 111 S.Ct. 1647. At the time *Gilmer* was decided, the NYSE's rules may also have permitted arbitration claims submitted as class actions. *Compare* NYSE Rule 600(d) (2008) ("A claim submitted as a class action shall not be eligible for arbitration under the Rules of the Exchange.") *with* NYSE Rule 612(d) (1991) (containing no prohibition on class actions). The statement in *Gilmer* that the arbitration clause would be enforceable "even if" class remedies were available evidences that the Court itself was uncertain, but acknowledged the probability, that class actions were feasible under the NYSE's rules. Moreover, it is dicta that does not apply here. The plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions. Rather, the conundrum presented by the instant appeal is more nuanced: whether the man-

datory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity.

Green Tree Financial Corp.-Alabama v. Randolph also involved the enforcement of a statutory right, this time under the TILA. 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). The specific issue to be decided was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Randolph*, 531 U.S. at 82, 121 S.Ct. 513. The plaintiff argued "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have had against [the defendants]." *Id.* at 90, 121 S.Ct. 513. The Supreme Court rejected this argument because the plaintiff had proved no more than that the asserted "risk" was hypothetical:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with

> prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

Id. at 90-91, 121 S.Ct. 513.

Other Circuits also observed that a plaintiff could challenge a class action waiver clause on the grounds that it would be a cost prohibitive method of enforcing a statutory right, provided that a plaintiff set forth sufficient proof to support such a finding. *See, e.g., In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir.2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir.2003) ("In the present case, the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002) ("[Lead plaintiff] makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff.").

We continue to find *Randolph* "controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *In re Am. Express*, 554 F.3d at 315 (quoting *Randolph*, 531 U.S. at 92, 121 S.Ct. 513). The Supreme Court also recognized that public policy concerns might bar enforcement of an agreement to arbitrate in *Mitsubishi Motors Corp. v. Soler*

Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The *Mitsubishi* Court recognized, however, that there might be instances in which an arbitration agreement contained provisions that would be unenforceable because they would prevent a prospective litigant from vindicating its rights under the Sherman Act in an arbitral forum. *Id.* at 637, 105 S.Ct. 3346. Specifically, the amici in *Mitsubishi* speculated that the choice-of-forum and choice-of-law clauses in the arbitration agreement at issue would effectively preclude the arbitrator from determining the plaintiff's substantive claims in accordance with the terms of the Sherman Act. *Id.* at 637, n.19, 105 S.Ct. 3346. The Court responded that it would not prevent the case from going to arbitration based upon mere conjecture as to what body of law the arbitrator would apply, but also continued as follows:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n. 19, 105 S.Ct. 3346. While dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsis-

tent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96 cv 3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997) ("GFI could not have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

We find the record evidence before us establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws. Plaintiffs submitted to the district court a detailed affidavit from Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French stated that the purpose of his affidavit was "to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to compare this with "the potential recovery of damages by an American Express Card merchant with annual sales volume of $10 million or less, such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." (A362, ¶ 4)

Dr. French continued:

> Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my

> experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million . . . . In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.

(A362-63, ¶ 4) Dr. French then considered the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled . . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

(A365, ¶ 10-11)

Dr. French's affidavit demonstrates that the only economically feasible means for enforcing their statutory rights is via a class action. As discussed in our earlier opinion, the district court did not directly address Dr. French's affidavit, focusing instead on the damages provision of the Clayton Act, 15 U.S.C. § 15(a). *In re Am. Express*, 554 F.3d at 317. We found that while the Clayton Act does provide for treble awards along with the recovery of attorneys' fees and expenses, that was unlikely to assist plaintiffs here, where "the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case." *Id.* We also found the Clayton Act's fee-shifting provisions inadequate to alleviate our concerns given the low expert witness reimbursement rate. *Id.* at 318. "Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *Id.*

As we did earlier, we find "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." *In re Am. Express*, 554 F.3d at 319. We again conclude "that enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws.'" *Id.* Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms

and incentives in the antitrust statutes. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) ("[p]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Dando B. Cellini, "*An Overview of Antitrust Class Actions*," 49 Antitrust L.J. 1501, 1506 (1980) (discussing private, class action antitrust lawsuits and observing that "it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable. The two caveats we articulated in our original opinion still apply. *In re Am. Express*, 554 F.3d at 320. Our decision in no way relies upon the status of plaintiffs as "small" merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights. In this case, the record demonstrates that the size of any potential recovery by an individual plaintiff will be too small to justify the expense of bringing an individual action. Moreover, we do not conclude here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. Rather, we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agree-

ments." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S.Ct. 927.

Amex argues that *Stolt-Nielsen* expressly rejects the use of public policy as a basis for finding contractual language void. We disagree. While *Stolt-Nielsen* plainly rejects using public policy as a means for divining the parties' intent, nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language void. We agree with plaintiffs that "[t]o infer from *Stolt-Nielsen*'s narrow ruling on contractual construction that the Supreme Court meant to imply that an arbitration is valid and enforceable where, as a demonstrated factual matter, it prevents the effective vindication of federal rights would be to presume that the *Stolt-Nielsen* court meant to overrule or drastically limit its prior precedent." (Plaintiffs' Supp. Brief, p. 7) Following the *Stolt-Nielsen* decision, our court reached a similar conclusion in considering a different iteration of the issue: whether class action waivers are unconscionable as a matter of state law. *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 140 (2d Cir.2010).

As *Fensterstock* recognizes, however, *Stolt-Nielsen* does alter what relief this Court may order. *Stolt-Nielsen* plainly precludes us from ordering class-wide arbitration, but we did not do so earlier. *Fensterstock*, 611 F.3d at 139-41; *In re Am. Express*, 554 F.3d at 321. Indeed, we specifically stated in our earlier opinion that we were remanding to the district court to "allow Amex the opportunity to withdraw its motion to compel arbitration," *In Re Am. Express*, 554 F.3d at 321, and it appears that Amex did so, choosing litigation over arbitration. (Amex Supp. Br. p. 5, n.1) Our ruling does not disrupt the current

status quo. Hence, we remand to the district court for further proceedings consistent with this opinion.

CONCLUSION

For the reasons given above, the decision of the district court is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
Plaintiffs-Appellants,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
Defendants-Appellees.

Argued: Dec. 10, 2007

Decided: Jan. 30, 2009

POOLER, SACK, and SOTOMAYOR, Circuit Judges.

POOLER, Circuit Judge:

This Court frequently enforces mandatory arbitration clauses contained in commercial contracts. We do so on the principle that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied."

Arciniaga v. General Motors Corp., 460 F.3d 231, 234 (2d Cir.2006) (quotation marks omitted). On this appeal, however, we are asked to consider the enforcement of a mandatory arbitration clause in a commercial contract that also contains a "class action waiver," also referred to as a "collective action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. This is a matter of first impression in our Court.[7]

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[7] We note that two district courts in our Circuit have found class action waivers in mandatory arbitration clauses to be enforceable. In *Sherr v. Dell, Inc.*, No. 05cv10097, 2006 WL 2109436 (S.D.N.Y. July 27, 2006), a consumer brought a putative class action suit against Dell alleging that certain of the latter's products had a dangerous tendency to overheat. The plaintiff asserted claims under the statutory and common law of New York. *Id.* at *1. Dell moved to compel arbitration and for the enforcement of a class action waiver contained in its sales contract, the terms of which were not even available to the consumer before purchase short of his calling a special telephone number or visiting a Dell internet site. *Id.* The district court granted the motion to compel, holding that the "plaintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else with a similar problem. The [Federal Arbitration Act's] primary purpose is not to create a right to sue as a class. Its main purpose is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at *7 (quotation marks omitted). The case was decided according to the law of Texas, which, the district court found, had incorporated the Federal Arbitration Act as part of its substantive law. *Id.*

Dumanis v. Citibank (South Dakota), N.A., No. 07cv6070, 2007 WL 3253975 (W.D.N.Y. Nov.2, 2007), was an action involving credit card interest rates brought under the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and the New York General Business Law. The contract at issue had a South Dakota choice of law clause, and the decision was based upon the law of that state, not the federal law of arbitration. *Id.* at *2-*3. The

One commentator has recently contended that "[t]he outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers." Bryan Allen Rice, "Comment: Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard," 45 *Hous. L.Rev.* 215, 224 (2008).[8] We acknowledge at the outset, as have other courts that have considered questions arising from the enforcement of class action waivers, in both consumer and commercial contracts, that the wisdom and utility of these provisions have become the subject of intense debate. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir.2007) ("We recognize that there is a policy debate about whether class action waivers essential-

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district court enforced the class action waiver contained in the contract's mandatory arbitration clause, both because the plaintiff could have "opt[ed] out" of the arbitration clause by not renewing his credit card and because the plaintiff had not been stripped of any substantive remedies; he merely could not pursue them "in the arguably more-favorable context of a class action." *Id.*

We note that in neither *Sherr* nor *Dumanis* does it appear that the plaintiff made a substantial demonstration – which we hold that the plaintiffs have made here – to the effect that an inability to pursue arbitration on a class basis would be tantamount to an inability to assert their claims at all.

[8] Two commentators have suggested that this is particularly so in the credit card industry: "Credit card companies have shown themselves to be even less enthusiastic about classwide arbitration than about class action litigation. The 'devil you know' phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a 'renegade arbitrator' certifying a class and exposing a company to massive liability." Samuel Issacharoff & Erin F. Delaney, "Credit Card Accountability," 73 *U. Chi. L.Rev.* 157, 179 (2006).

ly act as exculpatory clauses, allowing for violations of laws where individual cases involve low dollar amounts and so will not adequately address or prevent illegality."). The opposing positions in this frequently impassioned debate have been dispassionately described as follows:

> Companies' use of class action waivers is motivated by the view that plaintiffs exploit the class action procedure in order to wrest large and unfair settlements from defendants . . . . Class action waivers are viewed by these companies as a way to defend themselves from consumers who are ganging up on companies through the leverage inherent in the aggregation of large numbers of claims. In further support of these waivers, corporations argue that the many (perceived) advantages of arbitration to a plaintiff make up for any disadvantages or inconveniences that the plaintiff may incur by sacrificing the ability to be part of a class action.
>
> . . . Opponents of class action waivers contend that the ability to aggregate claims is crucial to protect the rights of those individuals . . . who do not have the resources to litigate individual claims. Further, many individual claims are only viable if brought on a class-wide basis. Indeed, by prohibiting class actions in . . . lawsuits[] where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior . . . .

J. Maria Glover, "Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agree-

ments," 59 *Vand. L.Rev.* 1735, 1746-47 (2006) (footnotes and internal quotation marks omitted).

Both of these positions have been proffered to the Court by amici. *Compare* Brief of Atlantic Legal Foundation at 4 ("For several decades, providers of products and services in the United States have been beset with a litigious environment that has evoked criticism of many observers and applauded only by those professionals who have harvested the substantial financial rewards the civil justice system has produced by way of attorneys' fees . . . . Recognizing the risks of defending against class action litigation, many businesses have elected to have disputes resolved by individual arbitrations and to adopt collective action waivers as part of their arbitration clauses with their business customers to insure that result.") *with* Brief of Trial Lawyers for Public Justice at 27 ("It is . . . crucial to understand that any ban on class arbitration is essentially a ban on class treatment altogether, as arbitration clauses in standardized corporate contracts are made broader and broader, to encompass all conceivable types of disputes . . . . Under a regime where such prohibitions are enforced, such clauses are tantamount to a clause banning all claims against a corporation, unless they are so large that they justify the outlay of the extraordinary expense involved.").[9]

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[9] Interestingly, when it enacted the Class Action Fairness Act of 2005, Congress itself found both utility and danger in the use of the class action device. *Compare* Pub.L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005) ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated . . . .") *with id.* at § 2(a)(2) ("Over the past decade, there have been abuses of the class

We note that two standard treatises on the conduct of class action litigation appear to take opposing positions as well. *Compare* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice*, § 2:14 (3d ed. 2006) ("As the potential availability of class-wide arbitration threatens to multiply exponentially the exposure on what is facially a single-consumer issue, companies should strongly consider including in their standard arbitration agreements an express provision barring class action litigation or arbitration.") *with* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 9:67 n. 2 (4th ed. 2008) ("The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights.").

While we are conscious of this debate, we are thankful that we need not resolve it on this appeal. That is, we do not decide whether class action waiver provisions are either void or enforceable *per se*. Rather, we are concerned solely with the class action waiver contained in the contract between the parties before us on this appeal. We conclude that, on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.

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action device that have – (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.").

FACTS

A. Procedural Posture. The plaintiffs appeal from the judgment, dated March 20, 2006, memorializing the memorandum opinion and order, dated March 15, 2006, of the United States District Court of the Southern District of New York, which granted defendants American Express Company and American Express Travel Related Services Company, Inc.'s (collectively "Amex") motion to compel arbitration. *See In re American Express Merchants Litig.*, No. 03cv9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006) (Daniels, J.). The earliest iteration of the plaintiffs' claims was made in August 2003, with the filing of a class action complaint in the United States District Court for the Northern District of California ("the *Italian Colors* action"). This action, and another subsequently filed class action, were transferred, on Amex's motion, brought pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Southern District of New York. (JA 14, 85) By an order, dated December 10, 2004, that court consolidated these two actions, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, with several class actions that had been filed in the Southern District of New York. Any subsequently filed related actions were also made subject to this consolidation order.

Because we consider here only the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, a prolix description of the plaintiffs' claims is unnecessary. (And, needless to say, we take no position on the merits of these claims.) In their briefs on this appeal, the parties describe the plaintiffs' claims largely by reference to the amended com-

plaint, filed December 24, 2003, in the *Italian Colors* action. We will do so as well.

B. The Parties. The plaintiffs allege that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets." The named plaintiffs seek to represent the following class, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> The class is comprised of all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . . .

C. The Card Acceptance Agreement. The basic contractual relationship between Amex and the plaintiffs is set forth in an affidavit of an Amex executive:

> American Express issues card products to its cardmembers, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be

> governed by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").[10]

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause. That clause is nothing if not capaciously worded:

> For the purpose of this Agreement, *Claim* means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited

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[10] Amex confirmed at oral argument that this $10 million figure relates to purchases made with Amex products, not to purchases made by credit cards generally.

to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.

* * *

Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/ Endispute (JAMS), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the fact that the Agreement also contains the following provision:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF

> CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
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> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (*Service Establishments*), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

Thus, the Card Acceptance Agreement not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis. The Card Acceptance Agreement further provides as follows:

> This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*). The arbitrator shall apply applicable substantive law consistent with the FAA . . . . In conducting the arbitration proceeding, the arbitrator shall not apply the Federal or any state rules of civil procedure or rules of evidence. The

> arbitrator shall apply the applicable provisions of the Code of Procedure of the NAF, JAMS or AAA, as applicable to matters relating to evidence and discovery.[11]

D. The Plaintiffs' Substantive Claims. The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards." The district court explained the distinction as follows:

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

In re American Express Merchants Litig., 2006 WL 662341, at *1 n. 6.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. Amex is alleged to be the undisputed leader in this market, to the extent that it "issues Corporate Cards to at least 70% of the

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[11] The plaintiffs make no challenge to this preemption of the Federal Rules of Civil Procedure by the rules of the various arbitration firms listed in the Card Acceptance Agreement. We note, however, that some commentators have argued that plaintiffs are placed at a distinct disadvantage by class arbitration rules of these firms. *See* Daniel R. Higginbotham, "Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers," 58 *Duke L.J.* 103, 123 (2008) ("Regarding many important issues . . . the rules [of arbitration firms] are either silent or diverge significantly from the Federal Rules of Civil Procedure, raising serious questions as to the ability of class arbitration to adequately resolve disputes.").

companies included in the Fortune 500, and is likewise the leading issuer of Corporate Cards to middle-market companies . . . and small businesses." The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card."

Thus, the holder of a charge card is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs. Amex is certainly not unaware of this attraction, and as a result of it, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each purchase made with its card at the merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, MasterCard, and Discover.

Over the last decade, however, the plaintiffs contend that Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." Specifically, Amex has in recent years created new credit card products "marketed to college students, young adults and others who would certainly not produce the high per-transaction spending that Amex uses to justify [the] high [merchant] discount fees. By leveraging its market power in corporate and personal charge cards, however, American Express was able to compel merchants to accept its

new revolving credit card product[s] at the *same* elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies

> to your acceptance of American Express© Cards .... *American Express Card(s)* ... shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[12]

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[12] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78

E. The District Court's Decision. Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 15, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re American Express Merchants Litig.*, 2006 WL 662341, at *4. The district court proceeded to consider the plaintiffs' contention that enforcement of the class action waiver would effectively strip them of the ability to assert their claims because "each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5000." *Id.* The district court expressed skepticism that this argument amounted to much:

> Plaintiffs' contention . . . that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. 15(a) . . . .

Id. at *5 (footnote omitted).

S.Ct. 514, 2 L.Ed.2d 545 (1958). A tying arrangement will violate Section 1 of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (internal quotation marks omitted).

This observation was quickly reduced to dicta, however. This is because the district court proceeded to hold that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration.

The plaintiffs also made two additional arguments before the district court. First, they contended that the class action waiver could not be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement. Amex purportedly informed these plaintiffs of the inclusion of the clause by means of an amendment to the Agreement. The plaintiffs contended, however, that (1) Amex had not produced sufficient evidence of the fact that the "pre-1999 plaintiffs" had ever received this amendment and (2) even if the plaintiffs had received the amendment, their original merchant contract with Amex did not allow the subsequent introduction of an arbitration clause. The district court rejected these arguments, concluding that the plaintiffs had not successfully rebutted the presumption of mailing to which Amex is entitled and that the arbitration amendment constituted a reasonable addition to the original merchant contract. *Id.* at *7-*9.

Second, the plaintiffs contended that the class action waiver was not enforceable against named plaintiffs and class members who were citizens of

California because the waivers were unconscionable under that State's law. The district court concluded that this was "a substantive matter[] to be raised before the arbitrator." *Id.* at *9.

The district court concluded as follows: "[Amex's] motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against [Amex] are subject to arbitration, it further orders that plaintiffs' cases against [Amex] be dismissed." *Id.* at *10. The plaintiffs filed a timely appeal.

ANALYSIS

Before we proceed to the weighing of the parties' arguments, we think it would be helpful to set forth some of the issues which are not raised on this appeal. Specifically, these are issues which are commonly raised in the general run of arbitration cases with which this Court is faced.

First, the plaintiffs are not contending that the mandatory arbitration clause contained in the Card Acceptance Agreement is not broad enough to cover their antitrust claims. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 175 (2d Cir.2004) (holding that antitrust claims were arbitrable under a broad arbitration clause even though the claims concerned "matters beyond the making of a particular contract between the parties and the performance of its terms"). Further, while they certainly do not deny that this case is one of considerable legal and evidentiary complexity, the plaintiffs do not argue that their claims are too complex to be properly handled in arbitration. *See id.* at 181 (rejecting argument that claims involving a "horizontal price-fixing conspiracy" were beyond the capabilities of an arbitral panel). Nor do the plaintiffs take issue with the dicta

in *JLM* to the effect that this Court would view "skeptically" any argument positing that the "assertion of class claims should serve as a bar or deterrent to sending" a case to arbitration. *Id.* at 180 n. 9. On the contrary, the plaintiffs expressly aver that they "are not averse to proceeding in a class-wide arbitration."[13] (Blue 29) The plaintiffs are therefore not seeking to revive "the ancient judicial hostility to arbitration" as a form of dispute resolution. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998). In asking us to hold that the class action waiver in the Card Acceptance Agreement is unenforceable, however, the plaintiffs are implicitly asking us to limit the principle that "many features of arbitration by contract, including . . . procedure and choice of substantive law," *Hall Street Assocs., LLC v. Mattel, Inc.*, — U.S. —, 128 S.Ct. 1396, 1404, 170 L.Ed.2d 254 (2008), are to be left to the discretion of the contracting parties, unsupervised by judi-

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[13] It is apparent that "[c]lass arbitration is a swiftly growing phenomenon. In late 2003, the American Arbitration Association ('AAA') introduced procedures for class arbitrations . . . . As of September 27, 2007, the AAA was administering more than 190 class arbitrations, and from July 10, 2006 until September 27, 2007 alone, the number of AAA-administered class arbitrations increased by more than 50%." David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 *Bus. Law.* 55, 56 (2007). Clancy and Stein go on to argue that when Congress passed the Federal Arbitration Act, in 1925, it specifically envisioned arbitration as "something inherently prompt, inexpensive, and streamlined," and "did not expect that arbitrators would adjudicate anything like the modern class action . . . ." *Id.* at 61, 67. Although the argument that class proceedings in arbitration are incompatible with the Federal Arbitration Act is an intriguing one, we are presented with no such argument on this appeal.

cial review.[14] Although we believe that it is a close question, we believe that the plaintiffs are correct.

A. Jurisdiction. Section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." Because "an order compelling arbitration and dismissing a party's underlying claims is a 'final decision with respect to an arbitration,'" *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), there is no dispute that this Court has jurisdiction to hear the instant appeal.

B. Who Should Decide Whether the Class Action Waiver is Enforceable? The plaintiffs argue – and we do not see that Amex posits any argument to the contrary – that the district court erred in holding that the question of the class action waiver's enforceability is a matter for the arbitrator, not the court. This is plainly correct.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court stated that

> [c]hallenges to the validity of arbitration agreements . . . can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the contract as a whole, either on a ground that

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[14] The principle was limited by the Court itself in *Hall Street* which held that parties are not free to compose arbitration agreements which provide for a greater scope of federal court review of arbitral awards than that set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, because this would be at odds with the FAA's "substantiat[ion of] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." 128 S.Ct. at 1405.

> directly affects the entire agreement (*e.g.* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citation omitted). The Court then held that if there is a challenge to "'the arbitration clause itself – an issue which goes to the making of the agreement to arbitrate – the federal court may proceed to adjudicate it. But [the FAA] does not permit the federal court to consider claims [which challenge] the contract generally.'" *Id.* at 445, 126 S.Ct. 1204 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

The plaintiffs are plainly challenging the Card Acceptance Agreement's arbitration clause insofar as they dispute the enforceability of its class action waiver and, by extension, the validity of the parties' agreement to arbitrate. Their "challenge is to the arbitration clause itself," *id.*, rather than to the entirety of the Card Acceptance Agreement.[15] This appeal therefore involves "a gateway dispute about whether the parties are bound by a given arbitration clause," a dispute which "raises a question of arbritrability for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (internal quotation marks omitted); *accord Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir.2006); *Jenkins v. First Am. Cash*

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[15] The plaintiffs' challenge to the enforceability of the class action waiver is distinct from any contention to the effect that Amex's alleged tying arrangement renders the entire Card Acceptance Agreement invalid. *See* Amex Brief at 49. The latter issue is not before us.

Advance of Georgia, LLC, 400 F.3d 868, 877 (11th Cir.2005).[16] We will therefore proceed to consider whether the class action waiver contained in the Card Acceptance Agreement is enforceable.

C. The Enforceability of Class Action Waiver Provisions: General Considerations. The FAA was "enacted . . . to replace judicial indisposition to arbitration," *Hall Street*, 128 S.Ct. at 1402, and is, as we acknowledged at the outset of this opinion, an expression of "a strong federal policy favoring arbitration as an alternative means of dispute resolution." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir.2001). The favoring of arbitration is, however, somewhat tempered by the fact that "[a]rbitration is strictly a matter of contract." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir.1995). Enhancing the federal policy favoring arbitration is therefore largely a matter of "mak[ing] arbitration agreements as enforceable as other contracts, *but not more so*." *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 369 (2d Cir.2003) (internal quotation marks omitted).

This principle is set forth in Section 2 of the FAA, 9 U.S.C. § 2, which provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable,

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[16] In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the Supreme Court was faced with an arbitration agreement which was ambiguous as to whether it permitted arbitration proceedings to be conducted on a class basis. The Court concluded that this was a matter of contract interpretation which "should be for the arbitrator, not the courts, to decide." *Id.* at 453, 123 S.Ct. 2402. Here, we do not face an issue of contract interpretation; the Card Acceptance Agreement is unambiguous in forbidding arbitration to proceed on a class basis.

save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is "the primary substantive provision" of the FAA which "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" FAA. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). We join other Circuits that have evaluated arbitration clauses containing class action waivers under the federal substantive law of arbitrability. *See Gay v. CreditInform*, 511 F.3d 369, 394-95 (3d Cir.2007) (holding class action waiver to be enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); *Kristian*, 446 F.3d at 63 ("Although Plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . . ."). We conclude that the plaintiffs here have demonstrated that enforcement of the class action waiver in the Card Acceptance Agreement to cover their claims against Amex under federal antitrust statutes would be incompatible with the federal substantive law of arbitration.

We begin by recognizing that insofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under Rule 23 of the Federal Rules of Civil Procedure, the right "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). Nevertheless, the Supreme Court has repeat-

edly recognized the utility of the class action as a vehicle for vindicating statutory rights. This is especially true with respect to the Court's recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Thus, as the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)); *see also Roper*, 445 U.S. at 338, 100 S.Ct. 1166 ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 144

(2d Cir.2008) ("[C]lass actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[T]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.").

The Supreme Court has at least implicitly held that a provision in an arbitration agreement barring class procedures is not *per se* unenforceable because, as noted above, it held in *Bazzle* that the question of whether or not an ambiguous arbitration clause contained a class action ban was a matter for the arbitrator, not the court, to decide. 539 U.S. at 453, 123 S.Ct. 2402. Beyond this oblique ruling, however, the Supreme Court has yet to squarely face the question of whether or not there are conditions under which a class action ban would be incompatible with the FAA. But, as both parties here acknowledge, the Court has decided cases which involved matters which, if ancillary, are certainly pertinent to this question.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), involved a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Specifically, the plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23, 111 S.Ct. 1647. After the plaintiff had filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rules of the New York Stock Exchange ("NYSE"), to

which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24, 111 S.Ct. 1647.

The Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26, 111 S. Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Even though the Court acknowledged that "the ADEA is designed not only to address individual grievances, but also to further important social policies," *id.* at 27, 111 S.Ct. 1647, the Court could discern no Congressional intent to preclude ADEA claims from being subject to arbitration. The Court also considered the plaintiff's argument to the effect "that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32, 111 S.Ct. 1647. The Court rejected this contention:

> As the court below noted, however, arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that

> individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).

Amex directs our attention to the final sentence of this passage, and other courts have relied upon it in upholding mandatory arbitration clauses. Amex Brief at 19. In particular, the Third Circuit, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir.2000), dealt with a claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* The plaintiffs argued that their class action claim in federal court was not subject to mandatory arbitration because TILA

> effectively create[s] an unwaivable right to bring a class action . . . . [In TILA,] Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims.

Id. at 377.

The Third Circuit held that "[t]his argument is unavailing in light of" *Gilmer*. *Id.* The court noted that *Gilmer* involved a claim under the ADEA, a statute which explicitly provides in its text for the bringing of class actions. *Id.* (citing 29 U.S.C. § 626(b)). In spite of this, the court concluded, "the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the

class action remedy there." *Id.*; *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) ("[W]e reject the [plaintiffs'] claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the [Fair Labor Standards Act.] The Supreme Court rejected similar arguments concerning the ADEA in *Gilmer* . . . .").

We cannot agree with this view of *Gilmer* because a collective, and perhaps a class action remedy, in fact *was* available in that case. As set forth above, the Supreme Court explicitly noted that the arbitration rules of the NYSE provided for the conduct of collective arbitration. 500 U.S. at 32, 111 S.Ct. 1647. At the time *Gilmer* was decided, the NYSE's rules may also have permitted arbitration claims submitted as class actions. *Compare* NYSE Rule 600(d) (2008) ("A claim submitted as a class action shall not be eligible for arbitration under the Rules of the Exchange.") *with* NYSE Rule 600 (1991) (containing no prohibition on class actions). The statement in *Gilmer* that the arbitration clause would be enforceable "even if" class remedies were available evidences that the Court itself was uncertain, but acknowledged the probability, that class action were feasible under the NYSE's rules. Moreover, it is dicta that does not apply here. The plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions. Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to

preclude their bringing Sherman Act claims against Amex in *either* an individual or collective capacity.

After the Third Circuit's decision in *Johnson*, the Supreme Court came somewhat closer to this issue in *Green Tree Financial Corp.-Alabama v. Randolph*. That case also involved a claim under TILA and a consideration of the enforcement of a mandatory arbitration clause. The specific issue to be decided was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Green Tree*, 531 U.S. at 82, 121 S.Ct. 513. Specifically, the plaintiff argued "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have had against [the defendants]." *Id.* at 90, 121 S.Ct. 513. The Court rejected this argument because the plaintiff had proved no more than that the asserted "risk" was hypothetical:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter .... The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative

> to justify the invalidation of an arbitration agreement.

Id. at 90-91, 121 S.Ct. 513 (footnote omitted); *see also In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir.2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.").

Although the Court in *Randolph* declined to consider whether the arbitration agreement was unenforceable because it may have precluded the plaintiff from bringing her claims under TILA as a class action, 531 F.3d at 92 n. 7, courts have relied upon its holding to uphold such bans. *See In re Cotton Yarn Antitrust Litigation*, 505 F.3d at 285 ("This kind of uninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir.2003) ("In the present case, the Livingstons have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002) ("Adkins makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff.").

D. Is the Class Action Waiver in the Card Acceptance Agreement Enforceable? *Randolph* is controlling here to the extent that it holds that

when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S.Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Merchants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver.[17] The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

This argument is compellingly set forth in an affidavit filed in the district court by Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French states that the purpose of his affidavit is "to provide an expert opinion concerning

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[17] "We review . . . mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir.2005) (internal citations omitted). The plaintiffs' estimated expert witness fees were essentially undisputed. We review de novo the district court's application of the Clayton Act to undisputed facts. *See Village of Grand View v. Skinner*, 947 F.2d 651, 656 (2d Cir. 1991) ("Because the issues presented on this appeal involve the application of a statutory standard to undisputed facts, the appropriate standard of review is de novo."). We note, however, that our ruling would not be different under a clearly erroneous standard.

the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to compare this with "the potential recovery of damages by an American Express Card merchant with annual sales volume of $10 million or less, such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." Dr. French continues:

> Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million .... In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that ... the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.
>
> An economic antitrust study ... is necessarily complex and costly because it involves investigating several antitrust liability and damages issues and, potentially involves numerous tasks and services. The antitrust liability and damages issues that an expert economist will study in this matter will likely include:

- defining the relevant tying and tied product markets and determining whether they are distinct;
- determining whether the defendant has market (monopoly) power in the tying product market, . . . ;
- determining whether the defendant has exercised its market (monopoly) power to enforce the tying arrangement;
- determining whether the tying arrangement has an anticompetitive effect in the tied product market;
- determining what the merchant fees would have been but for the alleged anticompetitive tying; and
- quantifying the dollar amount of damages to the plaintiffs as a consequence of the tying arrangement.

Dr. French then proceeds to consider the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> Based upon publicly available information . . . I have estimated that a small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation . . . . Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period.

> . . . The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled . . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

In *Kristian*, the First Circuit found that expert affidavits similar to Dr. French's "demonstrat[ed] that without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all." 446 F.3d at 58. We hold that the plaintiffs here have also demonstrated that their antitrust claims against Amex can, for all intents and purposes, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration.

The district court, which held that the enforceability of the class action waiver in the Card Acceptance Agreement was a matter to be determined in arbitration, did not deal head on with Dr. French's affidavit. Dr. French's conclusion that "in a non-class action involving an individual plaintiff . . . even a relatively small economic antitrust study will cost at least several hundred thousand dollars" was essentially

uncontested. Instead of addressing this figure, the district court misinterpreted and misapplied the statutory protections available to the plaintiffs. Citing Section 4 of the Clayton Act, 15 U.S.C. § 15(a), the district court noted that a plaintiff who had established a Sherman Act claim against a defendant "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *In re American Express Merchants Litig.*, 2006 WL 662341, at *5; *see also Dambrosio v. Comcast Corp.*, No. Civ.A.03-6604, 2005 WL 3543794, at *16 (E.D.Pa. Dec.27, 2005) (asserting that Section 4 of the Clayton Act "expressly provides for the recovery of attorneys' fees and expenses, [thereby] making the arbitral forum accessible to individual plaintiffs and allowing them to vindicate the full range of substantive rights granted to them" under the federal antitrust laws), *vacated on other grounds*, 2006 WL 2058643 (E.D.Pa. Apr.12, 2006).

This is true, but, as the plaintiffs correctly point out, the Clayton Act simply does not solve their problem. Besides the fact that the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more important legal consideration that the district court did not consider. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court addressed fee-shifting for expert witnesses under Rule 54(d) of the Federal Rules of Civil Procedure in an antitrust case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b) . . . ." 482 U.S. 437, 439,

107 S.Ct. 2494 (1987).[18] We note that that figure is now set at a $40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs.[19] Thus, Amex's reply to the effect that "[a]n arbitrator can award the same reasonable costs that are recoverable by statute," plainly does not solve the problem.

Amex also informs us that a putative antitrust class action challenging the "Honor All Cards" provision in the Card Acceptance Agreement has been brought in the U.S. District Court for the Southern District of New York by a merchant plaintiff who is apparently not subject to the class action waiver

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[18] Quoting *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir.1982), Amex suggests that if an expert's findings prove "to be so 'crucial' and 'indispensable' that an arbitrator determines that the case absolutely could not have been pursued without them, the arbitrator might award such costs." Amex Brief at 28. We are skeptical, however, that an arbitrator might follow *Paschall* because it appears unlikely that its holding survives *Crawford Fitting Co.* *See Gilbert v. City of Little Rock, Ark.*, 709 F.Supp. 856, 862 (E.D.Ark.1987) (holding that *Paschall* is inconsistent with the holding of *Crawford Fitting* to the effect that expert witness fees are to be determined solely in accordance with 28 U.S.C. § 1821(b)).

[19] The plaintiffs' counsel has submitted a detailed affidavit which estimates that the cost of depositions and document management would exceed $300,000.

provision in the Agreement. *See The Marcus Corp. v. American Express Co.*, No. 04cv5432, 2005 WL 1560484 (S.D.N.Y. July 5, 2005). Further pointing out that the plaintiffs in that action are represented by the same counsel who represent the plaintiffs here, Amex speculates that "[p]resumably" the plaintiffs here, "the *Marcus* plaintiff, and their common attorneys and experts could reach an agreement as to how the experts' cost of preparation could be shared." This is an intriguing proposition, but we do not believe it can survive the application of the following provision of the arbitration clause in the Card Acceptance Agreement: "The arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Thus, any proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.[20]

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[20] One of the amici makes the following suggestion: "Whatever costs the Merchant Plaintiffs might ultimately bear in procuring expert testimony in this case, those costs may be offset by the cost savings of conducting an arbitration proceeding, rather than an all-out federal trial." Brief of Business Roundtable at 16. But this misses the point. While it may be true that an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court, the fact remains that the plaintiffs have demonstrated to our satisfaction that *neither* an individual arbitration, *nor* an individual litigation would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action.

Concluding that Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). This may be especially true with respect to private antitrust suits brought as class actions. *See* Dando B. Cellini, "An Overview of Antitrust Class Actions," 49 *Antitrust L.J.* 1501, 1506 (1980) ("I think it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

In *Mitsubishi*, the Supreme Court held that there is by no means any necessary reason to prevent sending a Sherman Act claim to arbitration because "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. at 637, 105 S.Ct. 3346. The *Mitsubishi* Court recognized, however, that there might be instances in which an arbitration agreement contained provisions that would be unenforceable because they would prevent

a prospective litigant from vindicating its rights under the Sherman Act in an arbitral forum. Specifically, the plaintiff in *Mitsubishi* speculated that the choice-of-forum and choice-of-law clauses in the arbitration agreement at issue would effectively preclude the arbitrator from determining the plaintiff's substantive claims in accordance with the terms of the Sherman Act. The Court responded that it would not prevent the case from going to arbitration based upon mere conjecture as to what body of law the arbitrator would apply, but also continued as follows:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n. 19, 105 S.Ct. 3346.

We readily acknowledge that this statement is dicta, but it is nevertheless dicta grounded upon a firm principle of antitrust law to the effect that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96cv3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr.9, 1997) ("GFI could not

have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

We believe that one of the amici has correctly applied the principle just set forth to the facts of the instant case:

> Plaintiff[s]-appellants' antitrust claims are complex and plaintiffs established for the record below that if they are precluded from participating in a collective action, the cost to each individual consumer to prosecute his or her claim is prohibitive relative to the consumer's potential recovery. If the collective action waiver is enforced, American Express will be shielded from liability, even where it may have violated the antitrust laws. Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. Because the class action waiver precluded the plaintiff[s]-appellants from enforcing their statutory rights, the arbitration provision is unenforceable.

Brief of American Antitrust Institute at 15; *see also Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir.2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.").

We therefore hold that the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the FAA, 9 U.S.C. § 2, provides that an agreement to arbitrate

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

E. Two Caveats. We emphasize two important limitations upon our holding. First, our decision in no way rests upon the status of the plaintiffs as "small" merchants. The plaintiffs repeatedly refer to themselves as "small merchants" and as "small businesses." But Amex is correct when it counters that the plaintiffs "undoubtedly hope that, by labeling themselves as 'small,' they can benefit from one line of case law where individual *consumers* have alleged that arbitration agreements were imposed as a result of unequal bargaining power." *See, e.g., Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir.2008) (holding class action waiver contained in cellular telephone unconscionable under Washington law); *Skirchak*, 508 F.3d at 60 (holding class action waiver in employment agreement unconscionable under Massachusetts law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir.2007) (holding class action waiver in cellular phone contract unconscionable under California law). We do not follow these cases because they all rely on findings of unconscionability under state law, while we have relied here on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability. Applying the latter, we have found that plaintiffs have demonstrated the necessity of some class mechanism in order to bring their claims against Amex. This demonstration is in no way dependant on the "size" of any or all of the merchant

plaintiffs; it depends upon a showing that the size of the recovery received by *any* individual plaintiff will be too small to justify the expenditure of bringing an individual action.

Second, we stress that we do not hold here that class action waivers in arbitration agreements are *per se* unenforceable. We also do not hold that they are *per se* unenforceable in the context of antitrust actions.[21] Rather, we hold that *each* case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24, 103 S.Ct. 927. We believe that the Eleventh Circuit has posited something like the correct approach:

> [T]he enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant

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[21] We note that the Fourth Circuit, in *In re Cotton Yarn Antitrust Litigation*, has upheld the enforcement in an antitrust action of a collective action ban contained in a contract between commercial parties. The case presented a claim of antitrust conspiracy, and the court pointed out that a bar upon joining the two defendants, who were jointly and severally liable, did not preclude the arbitrability of the claim because "co-conspirators are not necessary parties; a plaintiff can prove the existence of a conspiracy in an action against just one of the members of the conspiracy." 505 F.3d at 284. The court also noted "[t]he absence of an evidentiary record on . . . the actual cost of individual proceedings and . . . about the ability of the corporate plaintiffs to bear those speculative costs." *Id.* at 285. Again, such a record exists in the instant case.

> circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

Dale, 498 F.3d at 1224.

F. The Plaintiffs' Other Claims. Because we hold that the class action waiver in the Card Acceptance Agreement is unenforceable as to all plaintiffs under the federal substantive law of arbitration, the plaintiffs' contention that the waiver is not enforceable against named plaintiffs and class members who were citizens of California because the waivers are unconscionable under that State's law is moot. Similarly, the plaintiffs' appeal of the district court's holding that the class action waiver could be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement is also moot.

G. Relief. Because the plaintiffs have declared themselves amenable to proceeding to arbitration, we need not consider whether the class action waiver in the Card Acceptance Agreement is severable from the remainder of the arbitration provision contained therein. Further, in light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand

to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.

CONCLUSION

The decision of the district court is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No. 03 CV 9592 (GBD)

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

GEORGE B. DANIELS, DISTRICT JUDGE:

American Express Company and American Express Travel Related Services Company, Inc., (collectively "American Express") move to compel arbitration of plaintiffs' claims and to dismiss these related actions consolidated for pretrial purposes or stay them pending arbitration.[1] American Express also moves to intervene and to dismiss in favor of arbitration the claims of plaintiffs in the separate case filed by plaintiffs against the banks entitled *National Supermarket Association, Inc., et al. v. MBNA America Bank, N.A., et al.* ("*National Supermarket*").[2] The bank defendants in National Supermarket move to dismiss the claims of plaintiffs in favor of arbitration or, in the alternative, to stay the action pending the

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[1] The consolidated cases are: *Italian Colors Restaurant, et al. v. American Express Co., et al.*, 03 cv 9592; *Cohen Rese Gallery, Inc., et al. v. American Express Co., et al.*, 03 cv 10271; *DFR Jeweler Corp. v. American Express Co., et al.*, 03 cv 9517; *Chez Noelle Restaurant v. American Express Co., et al.*, 04 cv 266; *Mascari Enterprises v. American Express Co., et al.*, 04 cv 366; and *Mims Enterprises, Inc. v. American Express Co., et al.*, 04 cv 1558.

[2] *National Supermarket Association, Inc., et al. v. MBNA America Bank, N.A., et al.*, 04 cv 10318, is also consolidated for pretrial purposes. Plaintiffs in *National Supermarket* are also plaintiffs in a number of the other consolidated cases.

arbitration of the related claims against American Express. Finally, the plaintiffs in *Cohen Rese Gallery, Inc., et al. v. American Express Co., et al.* ("*Cohen Rese*"), who are California merchants, move for partial summary judgment on the fifth claim for relief set forth in their amended complaint.[3]

American Express's motion to compel arbitration is granted, and plaintiffs' claims against American Express are dismissed. American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in *National Supermarket* is denied. Defendants' MBNA America Bank, N.A., MBNA Corporation, Citibank (South Dakota), N.A., and Citigroup, Inc. ("bank defendants") motion to dismiss the claims in *National Supermarket* is denied. The bank defendants' motion to stay the action in *National Supermarket* pending the arbitration of related claims against American Express, is granted. Finally the *Cohen Rese* plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice.

BACKGROUND[4]

Plaintiffs are merchants who accept defendant American Express's payment card products. They can be divided into two different geographic groups:

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[3] Claim five asserts that the defendants are in violation of the California Unfair Competition Law by forcing small merchants to waive the right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express through the collective action waivers in the merchant contracts.

[4] The factual background underlying these actions is set forth in greater detail in the related case of *Marcus Corp. v. American Express*, No. 04 Civ. 05432 (S.D.N.Y. July 6, 2005) (denying defendants' motion to dismiss).

those plaintiffs whose primary place of business is in the state of New York ("New York merchants"), which includes Italian Colors Restaurant,[5] ("Italian Colors"), DRF Jewelers Corp., ("DRF"), Chez Noelle Restaurant, ("Chez Noelle"), Mascari Enterprises, ("Mascari"), and Mims Enterprises, Inc., ("Mims"); and those plaintiffs based in California ("California merchants"), Cohen Rese Gallery, Inc., ("Cohen Rese"), Il Forno, Inc., ("Il Forno"), and Mai Jasmine Corp., ("Mai Jasmine"). Each merchant plaintiff contracted with American Express to accept its corporate, charge, and credit cards.[6]

American Express and its competitors Visa, MasterCard, and Discover collectively dominate the payment card industry.[7] Visa and MasterCard operate as joint ventures with the banks that issue their payment cards to consumers. American Express, by contrast, has until recently issued payment cards directly to the consumer, without partnering with banks. Having accepted a customer's payment card, merchants tender requests for payment to American

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[5] Plaintiff Italian Colors Restaurant consists of a previously consolidated group of New York merchants, including Phuong Corp., Bunda Starr Corp., 492 Supermarket Corp., and National Supermarkets Association, Inc.

[6] A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

[7] The payment card industry has been extensively discussed in recent litigation. Undisputed industry facts cited in this order are derived from *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004).

Express or, in the case of Visa and MasterCard, to the card-issuing bank.[8] Both the Visa/MasterCard and American Express models derive revenue by withholding a "merchant discount fee" from each tendered transaction. Plaintiffs allege that American Express charges a supra-competitive 3% merchant discount fee that greatly exceeds the fee charged by Visa and MasterCard. Plaintiffs contend that this supra-competitive fee can be sustained only through enforcement of an Honor All Cards ("HAC") provision, included in every merchant contract, that unlawfully ties American Express's charge and credit card services in violation of § 1 of the Sherman Act.[9]

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[8] In 2003, the Second Circuit affirmed a ruling that Visa and MasterCard violated antitrust statutes by colluding to require that their credit card-issuing bank partners refuse to issue American Express products; this collusion had effectively barred American Express from the credit card market. Prior to the resolution of the Department of Justice ("DOJ") litigation, Visa and MasterCard collectively controlled upwards of 90% of the credit card market. Since obtaining competitive access to card-issuing banks, however, American Express has moved aggressively into the market while maintaining its position as the leading issuer of corporate and consumer charge cards in the United States. Since the resolution of the DOJ litigation, American Express has negotiated card-issuing agreements with two of the nation's largest card-issuing banks, MBNA and Citibank.

[9] A typical tying arrangement is "an agreement by a party to sell one (tying) product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 461-62 (1992) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958)). The Supreme Court identifies the "essential characteristic" of an unlawful tying arrangement as "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at

Put simply, merchants who choose to accept the charge card must agree to accept all American Express cards.[10]

The merchant contract, or Card Acceptance Agreement ("Agreement"), is a 'form contract,' such that merchants do not negotiate its terms with American Express. Since 1999, American Express has included an arbitration provision in the Agreement. It requires arbitration of all claims "arising from or relating to this Agreement and/or the relationship resulting from this Agreement," upon the election of either party. 2001 American Express Card Acceptance Agreement, Defs.' Ex. A. The arbitration provision reads, in relevant part:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement . . .
>
> This section sets out the circumstances and procedures under which Claims may be arbitrated instead of litigated in court . . .
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which

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all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish v. Hyde*, 466 U.S. 2, 12 (1984).

[10] "*American Express Card* or *Card* shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc. or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo." 1999 American Express Card Acceptance Agreement, Pls.' Ex. 2, Decl. of Noah Shube.

> the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/ Endispute (*JAMS*), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration. If a selection by one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

In addition to prescribing binding arbitration of all claims, the Card Acceptance Agreement imposes a collective action waiver that precludes merchants from bringing or participating in class-wide actions regarding issues subject to arbitration. The provision reads, in relevant part:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THE CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED IN THE CODE OR PROCEDURES OF THE NAF, JAMS, OR AAA, AS APPLICABLE. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

The Card Acceptance Agreement also includes a New York choice of law provision that reads:

> THIS AGREEMENT WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS NEGOTIATED, EXECUTED AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK.

The complaints filed by the New York and California plaintiffs are largely identical, with slight variance in the number and type of claims.[11] All plaintiffs state three claims against American Express under Section 1 of the Sherman Act: 1) unlawful tying of charge card services and credit card services; 2) unlawful tying of corporate card services and credit card services; and 3) unlawful tying of charge or corporate card services and debit card services. Each New York plaintiff also states an additional claim under Section 2 of the Sherman Act, alleging that American Express maintains a monopoly by imposing a collective action waiver in each of its merchant contracts. Certain New York plaintiffs[12] also state a common law claim of unjust enrichment, alleging that the imposition of the supra-competitive merchant discount fee conferred an illegal benefit on American Express. California plaintiffs Cohen Rese,

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[11] Plaintiffs in the related case of *National Supermarket* have separately alleged that the bank defendants 1) conspired to violate section 1 of the Sherman Act by furthering the alleged tying by American Express of corporate charge card and credit card services, and 2) aided and abetted American Express's alleged violations of section 1 of the Sherman Act by rendering assistance to American Express in its alleged tying of corporate charge card and credit card services.

[12] DRF, Chez Noelle, Mascari, and Mims.

Il Forno, and Mai Jasmine additionally claim that the collective action waivers violate California's Unfair Competition Law.

DISCUSSION

American Express moves pursuant to 9 U.S.C. § 1 et seq. and Fed.R.Civ.P. 12(b) to compel plaintiffs to arbitrate their claims, and asks that this court either dismiss plaintiffs' complaints or stay the proceedings pending arbitration. Under the Federal Arbitration Act ("FAA"),[13] a district court may dismiss or stay proceedings if it finds a valid arbitration agreement exists and may compel arbitration when a party refuses to comply with that agreement. 9 U.S.C. §§ 3-4.

"The question of 'substantive arbitrability' is for the court not for the arbitrator to decide." *Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52, 55 (2d Cir. 1963) (citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). In order to determine whether or not a particular dispute is arbitrable, a court must decide "whether the parties agreed to arbitrate, and if so, whether the scope of that agreement encompasses the asserted claims." *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993) (quoting *David L. Threlkeld & Co. v. Metallgesellschafr Ltd.*, 923 F.2d 245, 149 (2d Cir. 1991)). While there is a strong federal policy favoring arbitration, a party may only be compelled to arbitrate a dispute to the extent he or she has agreed to do so. *Bell v. Cedent Corp.*, 293 F.3d 563,

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[13] The Arbitration Provision expressly states that the parties' agreement to arbitrate "is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act." *See* Cathryn A. Snyder Decl., Ex. B and D; Donald Blumenthal Decl., Ex. A.

566-67 (2d Cir. 2002); *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001). Where the scope of the arbitration agreement is ambiguous, any doubt should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "Another way of expressing this is to say that arbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute." *Spear, Leeds & Kellogg v. Central Life Assur. Co., et al.*, 85 F.3d 21, 28 (2d Cir. 1996) (citing *AT&T Technologies, Inc. v. Communications Workers of America, et al.*, 475 U.S. 643, 650 (1986)). Absent some ambiguity, however, it is the language of the contract that defines the scope of disputes subject to arbitration. *Equal Employment Opportunity Comm. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

American Express contends that plaintiffs are obliged to arbitrate their claims pursuant to the arbitration provision in their merchant contracts. In opposition, plaintiffs argue, *inter alia*, that to arbitrate their anti-trust claims individually would impose such punishing costs as to preclude vindication in that forum. All plaintiffs also argue that Claim IV of their amended complaints, which challenges the imposition of the collective action waiver provisions as an anti-trust violation in its own right, is inherently inarbitrable. The California plaintiffs, in their motion for partial summary judgment, claim that American Express's imposition of the collective action waiver provisions violated the California Unfair Competition Law by forcing small merchants to waive their right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express. Those plaintiffs

who signed merchant contracts prior to 1999 (the "pre-1999 plaintiffs")[14] deny having received defendant's mailing of that year imposing the arbitration and collective action waiver provisions. The pre-1999 plaintiffs further claim that the change-in-terms clause of their original contracts did not authorize the addition of an arbitration provision.

A. Enforceability of the Arbitration Agreement

The FAA established a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The FAA instructs courts that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2005). Congress enacted the FAA for the purpose of "revers[ing] the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the United States Supreme Court directed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 473 U.S. 614, 626 (1985); *see also Paine Webber, Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996). Thus, courts are to "construe arbitration clauses as broadly as possible." *Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (quoting *Collins & Aikman Prod. Co. v. Build-*

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[14] The pre-1999 plaintiffs are Italian Colors, Bunda Starr, Chez Noelle, Mascari, Il Forno, and 492 Supermarket Corp. *See* Snyder Decl. at 3-6.

ing Sys., Inc., 58 F.3d 16, 19 (2d Cir. 1995) (The parties were required to submit to arbitration "any claim or controversy arising out of or relating to th[e] agreement." The Second Circuit Court of Appeals found this to be "the paradigm of a broad clause," and further held that the claims at issue there were "presumptively arbitrable" pursuant to the clause)).

The arbitration provision in the merchant plaintiffs' card acceptance agreements is also a paradigmatically broad clause, thereby justifying a presumption of arbitrability. *See Oldroyd*, 134 F.3d at 76 (enforcing a clause requiring arbitration of "[a]ny dispute, controversy or claim arising under or in connection with" appellee's employment agreement); *Mehler v. Terminex Int'l Co. L.P.*, 205 F.3d 44, 49 (2d Cir. 2000) ("There is no dispute that the arbitration clause at issue is a classically broad one. . . . The clause provides for arbitration of 'any controversy or claim between [the parties] arising out of or relating to' the Agreement."). Plaintiffs' claims fall within the broad scope of the arbitration provision of the merchant Card Acceptance Agreement which covers "any claim, dispute or controversy between you and us arising from or relating to this Agreement." Snyder Decl., Ex. B and D; Blumenthal Decl., Ex. A. The Agreement applies to claims "based upon contract, tort, intentional tort, statutes, regulations, common law and equity." *Id.* The arbitration clause at issue here is enforceable absent an exception to the strong policy in favor of enforcing arbitration agreements.

1. The Costs of Individual Arbitration

Plaintiffs contend that the arbitration clause, which includes the contractual prohibition on collective action, should not be enforced. In order to effectively arbitrate their anti-trust claims under the

existing contractual rubric, plaintiffs argue that each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5000. Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 1-7. Plaintiffs seize upon the United States Supreme Court's suggestion in *Green Tree Corp. v. Randolph* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating . . . federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Plaintiffs, however, misconstrue the nature of the judicial inquiry into arbitration costs to which the Supreme Court alludes in *Green Tree* and *Gilmer*. A litigant seeking to evade a contractual arbitration clause must "show a likelihood that he or she will be responsible for significant arbitrators' fees, *or other costs which would not be incurred in a judicial forum*. *Ball v. SFX Broadcasting, Inc.*, 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001) (emphasis added); *see also Bradford v. Rockwell Semiconductor*, 238 F.3d 549, 556 (4th Cir. 2001) (finding that the "crucial inquiry" is whether "the arbitral forum in a particular case is an adequate and accessible substitute to litigation . . ."). Plaintiffs neither allege nor present evidence that arbitration would be any more costly than litigation.

Specifically, plaintiffs argue that "in the absence of the Collective Action Waivers, the small merchant plaintiff may vindicate its statutory rights by joining its claims with those of other merchants and pooling the costs of litigation (or attracting counsel willing to advance such costs.) In the presence of the Collective Action Waivers, the small merchant flatly cannot vindicate its statutory rights." Pls.' Memo. in Opp. to Mot. to Compel Arbitration at 2. Plaintiffs present

an affidavit from a "professional economist with substantial experience with individual and class action antitrust litigation" who asserts that "it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million." Decl. of Gary L. French, Ph.D, Pls.' App. of Decls. and Exs. in Opp. to Compel Arbitration, Ex. 5.

Plaintiffs' contention, however, that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[15] 15 U.S.C.A. 15(a) (2005); *see Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting, in a RICO action, plaintiff's argument that a collective action waiver was un-

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[15] Plaintiffs do not dispute that the full extent of remedies under the Clayton Act would be available in arbitration by any one of the contractually identified arbitrators (the National Arbitration Forum, JAMS/Endispute, and the American Arbitration Association). *See, e.g., In re Universal Service Fund Telephone Billing Practices Litigation*, 300 F.Supp.2d 1107, 1137 (D.Kan. 2003) ("*Universal Service Fund I*") (enforcing a class action waiver in an arbitration provision in a case which involved anti-trust claims and noting that "[there is no] irreconcilable conflict between a ban on class actions and the substantive rights provided by [the Sherman and Clayton Acts]. Congress already provided ample statutory incentives for plaintiffs to vindicate their rights under those statutes by, for example, being able to recover treble damage and attorneys fees . . .").

enforceable because "without the class action vehicle, [plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages."); *see also Plant v. Blazer Fin. Svcs.*, 598 F.2d 1357, 1365-66 (5th Cir. 1979) (holding, in a Truth in Lending Act action, that "[a]s a practical matter, the award of attorney's fees is a critical and integral part of this section"); *accord Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) (holding, in a TILA action, that "while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs . . . arbitration does not eliminate plaintiff incentives to assert rights under the Act").

Although plaintiffs claim that the arbitration and collective action waiver provisions of their contracts combine to "give Amex a 'free pass'" by discouraging litigation, the very statute under which they bring suit provides sufficient financial incentive to pursue their claims in the form of treble damages, costs, and attorneys' fees. Moreover, plaintiffs' attack on the enforceability of the collective action waivers is not an argument against arbitrability, but an argument against enforcing the collective action waiver provisions, whether the claims proceeded in arbitration or court.[16] Accordingly, plaintiffs' opposition to arbitration because of the collective action waiver provisions, on the theory that the costs preclude vindica-

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[16] "The sin of the agreements that Amex has imposed upon the small merchant plaintiffs is not that they mandate arbitration at all; it is that they bar collective action. If the arbitration clauses allowed for a class-wide arbitration, then there would not be a 'cost differential between arbitration and litigation in court . . . [that] is so substantial as to deter the bringing of claims.'" Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 11 (internal citations omitted).

tion of individual plaintiff's statutory rights, is unpersuasive.

2. Arbitrability of Plaintiffs' Anti-Trust Claim

In claim IV of plaintiffs' respective amended complaints, they "allege that the imposition of the arbitration clause *with* its Collective Action Waivers thus constitutes an illegal contract in restraint of trade and an unlawful monopoly maintenance device, under §§ 1 and 2 of the Sherman Act." Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 16 (emphasis added). Plaintiffs' contend that this claim is inherently inarbitrable because it "directly challenges the legality of the very clause that would support sending the case to arbitration in the first place." *Id.* Again, plaintiffs are actually challenging the enforcement of the collective action waivers, rather than making an argument about inherent inarbitrability. Indeed, arbitration agreements containing class action waivers are not inherently unenforceable as anti-competitive. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637-38 (4th Cir. 2002); *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 378 (3d Cir. 2000); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003); *Universal Service Fund I*, 300 F. Supp. at 1137 (concluding that the "inability to bring a class action . . . cannot by itself suffice to defeat the strong congressional preference for an arbitral forum").

The enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established. *See Buckeye Check Cashing, Inc. v. Cardegna et al.*, 126 S. Ct. 1204, 1209 (2006) ("[U]nless

the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 396-97, 404-06 (1967) (holding that an arbitrator should resolve a claim of "fraud in the inducement of the contract generally" since "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"); *Campaniello Imports, Ltd. v. Saporiti Italia S.P.A. et al.*, 117 F.3d 655, 667 (2d Cir. 1997). Moreover, procedural questions, which grow out of the dispute and bear on its final disposition, are presumptively not for the judge, but for an arbitrator to decide. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

In addition, the United States Supreme Court has cautioned against the use of anti-trust defenses to contract actions. *See Kelly v. Kosuga*, 443 F.2d 783, 785-6 (1959) ("[t]he plea of illegality [of a contract] on violation of the Sherman Act has not met with much favor in this Court"). The Supreme Court made clear that a plaintiff may raise an anti-trust defense to a contract only where enforcement "would make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 81 (1982). In *Viacom Inter'l, Inc. v. Tandem Productions, Inc.*, the Second Circuit Court of Appeals explained the Supreme Court's concern "that the successful interposition of anti-trust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens." 526 F.2d 593, 599 (2d Cir. 1975).

Plaintiffs further claim that if this Court compels arbitration of their anti-trust claim, the Court will be party to defendant's alleged anti-trust violation, i.e. the enforcement of the Honor All Cards provision. However, the collective action waiver does not apply simply to the Honor All Cards provision. According to the merchant contract, plaintiffs may not engage in collective litigation or arbitration with regard to *any* claims arising out of *any terms* of the contract, and not simply when challenging the Honor All Cards provision. In ordering arbitration of plaintiffs' Sherman Act claim in accordance with the language of the contract, this Court is enforcing a binding agreement entered into by the parties, rather than acting as a party to any of the alleged anti-trust actions on the part of defendant. Plaintiffs offer no persuasive argument why an arbitrator cannot adequately consider and resolve all issues of enforceability of the terms of the contract, including plaintiffs' claims regarding the collective action waivers. All of plaintiffs' claims, including their anti-trust claim, are therefore arbitrable.

3. The pre-1999 Plaintiffs, the Change-in-Terms Provision, and the 1999 Amendment

Further contesting defendant's motion to compel arbitration, the pre-1999 plaintiffs contend that 1) the change-in-terms provision in their original merchant contracts with defendant did not allow the later introduction of an arbitration clause, and 2) that, despite discovery on the issue, defendant has failed to establish that the pre-1999 plaintiffs received the mailing imposing the arbitration clause in 1999. The change-in-terms clause in the pre-1999 plaintiffs' merchant contracts provides: "[American Express] has the right to amend this agreement at

any time. We will notify you in writing at least ten (10) days in advance. If the changes are unacceptable to you, you may terminate this agreement . . ." Snyder Decl., Ex. A. The parties do not dispute that in 1999 American Express mailed an arbitration agreement amendment to thousands of contracting merchants. The pre-1999 plaintiffs, however, dispute that they received this mailing.

Plaintiffs draw this court's attention to *Stone v. Golden Wexler & Sarnese, P.C.*, a recent case that invalidated an arbitration agreement added to a contract via mailing. 341 F. Supp. 2d 189 (E.D.N.Y. 2004). The *Stone* court found the supplementary arbitration agreement invalid on the ground that the change-in-terms provision[17] in the original contract was drafted in such a way that the consumer plaintiffs could not "have anticipated that the Bank would change the method and forum for resolving disputes." *Id.* at 197. Since the contract as a whole lacked any mention of terms relating to dispute resolution, the court found that an arbitration agreement was not reasonably within the "universe of terms which could be altered or affected pursuant to the clause." *Id.* at 198. In a similar case, an Eastern District of Pennsylvania court held a supplementary arbitration

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[17] The Change in Terms provision at issue in the *Stone* case between consumers and the Bank read in pertinent part: "We may amend or change any part of your Agreement, including the periodic rates and other chargers, or add or remove requirements at any time . . . Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change . . . Changes to fees and other charges will apply to your account balance." *Stone*, at 197. The surrounding sections of the Customer Agreement in *Stone* dealt with such topics as credit limits, membership fees, periodic statements, and finance charges. *Id.* at 197-98.

agreement void when the terms of the original contract failed to "alert a consumer to the fact that [defendant] might later impose a term abrogating their rights." *Perry v. FleetBoston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616, at *13 (E.D.P.A. July 6, 2004) (noting elsewhere that "no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements").

The change-in-terms clause in the instant case, however, when coupled with other terms in the pre-1999 plaintiffs' merchant contracts, rendered the arbitration amendment at issue a reasonable addition to the original contracts.[18] The original contracts[19] included several terms relating to disputes and their

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[18] In contrast to the *Stone* change in terms provision, American Express' pre-1999 merchant contracts stated in pertinent part: "We have the right to change this Agreement at any time. We will notify you of any change in writing at least ten (10) days in advance. If the changes are unacceptable to you, you may terminate this Agreement." *See* Snyder Decl., Ex. A, C, and E. The surrounding sections in addition to discussing the parameters of the parties' financial relationship also discuss topics such as bankruptcy, indemnification, compliance with laws, governing law, waiver, assignment, and terminating the agreement.

[19] American Express was only able to provide copies of the merchant contracts in existence on the date of their agreement for three of the six pre-1999 plaintiffs. The merchant contract in effect in 1993 when Italian Colors signed an agreement with American Express is Exhibit A of the Snyder Declaration; the 1989 contract applicable to Bunda Starr is Exhibit C of the Snyder Declaration; and the 1991 contract applicable to Mascari is Exhibit E of the Snyder Declaration. Copies of the contracts in effect for Chez Noelle in 1982, Il Forno in 1988, and 492 Supermarket Corp. in 1996 were not located. *See* Snyder Decl. at 4-5 ¶¶ 7, 9 and 12.

resolution, including: a section entitled "Full Recourse" which "means that we [American Express] are entitled to payment from you [the merchant] for amounts payable or paid to you" in the event of any disputed charges or non-compliance with the terms of the contract; a section entitled "Disputed Charges," explaining that the merchant must respond in writing to any "claim, complaint, or question about any charge" if American Express requests and that American Express will have the right to "Full Recourse" from the merchant if a cardmember continues to withhold payment after the merchant's reply and the "[c]ard-member has the right under applicable law" to do so; a section entitled "Indemnification," whereby the merchant agrees to indemnify American Express and others "from and against all damages, losses and expenses . . . including reasonable attorneys' fees and costs" in "any suit or claim" arising out of certain situations under the agreement; a provision terminating the Agreement if the merchant becomes insolvent or involved in bankruptcy proceedings; and a "Governing Law" section identifying New York law as governing the agreement. *See, e.g.*, Snyder Decl., Ex. A, C, and E.[20]

Since the pre-1999 merchant contracts contained provisions concerning the resolution of disputes, including sections pertaining to various legal proceedings such as bankruptcy and lawsuits in which the merchant would indemnify American Express and pay their attorneys' fees, the original contract sufficiently alerted plaintiffs that the defendants' might later amend the terms of the contract with respect to

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[20] The quoted sections can be found in the 1993 merchant agreement. Snyder Decl., Ex. A. Sufficiently similar provisions under various headings can be found in Exhibits C and E.

the resolution of disputes between the parties. *Cf. Perry*, 2004 U.S. Dist. LEXIS 12616 at *13 (holding that an "ambiguous" change in terms provision did not allow Fleet "to make previously uncontemplated, unilateral changes to the Cardholder Agreement" like the arbitration provision since "no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements"). The 1999 arbitration amendment was reasonably within the "universe of terms which could be altered or affected pursuant to the clause." *Cf. Stone*, 341 F. Supp. 2d at 198. Moreover, unlike *Stone*, and virtually all of the cases upon which it relies, the agreement at issue in the instant case is an agreement between commercial parties, rather than one involving consumers. If American Express' 1999 arbitration amendment was not acceptable to any of the plaintiff merchants, each merchant was free to terminate its relationship with American Express rather than be subject to the amendment. Instead, the plaintiffs elected to continue their relationship with American Express well after the arbitration amendment was put into place.

The pre-1999 plaintiffs also deny having received the 1999 arbitration amendment. In light of documents produced by both parties during discovery on the limited issue of receipt of the amendment, however, plaintiffs have not successfully rebutted the presumption of mailing to which defendants are entitled. Under New York law, "when . . . there is proof of the office procedure followed in a regular course of business, and these procedures establish that the required notice has been properly addressed and mailed, a presumption arises that notice was received." *Leon v. Murphy*, 988 F.2d 303, 309 (2d

Cir. 1993) (citing *Nassau Insurance Co. v. Murphy*, 46 N.Y.2d 828, 829-30 (1978)). Once defendants have adduced sufficient evidence to merit that presumption, "[t]he mere denial of receipt does not rebut [it]." *Leon*, 988 F.2d at 309.

Defendants have presented evidence that establishes the following: in 1999 American Express compiled a list of merchants from whom it had processed charges in the previous twelve months; each of the plaintiffs submitted charges during that time period; each of the plaintiffs conceded having received other mailings from American Express during the relevant time period; a professional mailing company determined that 99.7% of the roughly 1.5 million merchant addresses given it by American Express could be reached by mail; and an American Express executive affirmed via affidavit that normal business practices were employed in the course of the mailing. Plaintiffs do not dispute, or produce evidence to challenge, these assertions. Although plaintiffs deny having received the amendments, this self-serving assertion is insufficient to rebut the presumption of mailing. Plaintiffs' presentation of a handful of e-mails reflecting frustration on the part of several of defendant's employees who conducted the mailing is similarly inconclusive. *See Meckel v. Continental Resources*, 758 F.2d 811 (2d Cir.1985) ("There must be – in addition to denial of receipt – some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable"). The arbitration amendment is therefore not rendered unenforceable for lack of receipt by the pre-1999 plaintiffs.

B. California's Unfair Competition Law

In the fifth claim of their amended complaint, the California plaintiffs claim that the collective action waivers violate California's Unfair Competition Law. Whether or not the defendants violated the California Unfair Competition Law by allegedly forcing small merchants to waive the right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express, is not a bar to sending all of the plaintiffs to arbitration pursuant to their contractual agreement with American Express. Rather, both the Sherman Act anti-trust claim and the California Unfair Competition claim are substantive matters to be raised before the arbitrator. *See, e.g., Zurich Ins. Co. v. Ennia General Ins. Co.*, 882 F.Supp. 1438, 1440 (S.D.N.Y. 1995) (holding that the issue of the law to be applied is a question for the arbitration panel, not the court once it determined that a binding agreement to arbitrate existed and the underlying dispute between the parties fell within its scope); *see also ATSA of Calif., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983), *amended*, 754 F.2d 1394 (9th Cir. 1985) ("when parties agree to submit disputes to arbitration it is presumed that the arbitrator is authorized to determine all issues of law and fact necessary to resolve the dispute"). Indeed, in determining arbitrability, the court may not consider the merits of the parties' claims or the likelihood of success at arbitration, since the parties agreed to submit "any claim" to arbitration, not just those claims which the court determines are meritorious. *See Spear, Leeds & Kellogg*, 85 F.3d at 28-29. The California plaintiffs'

concede as much in their motion papers.[21] Therefore their motion for partial summary judgment is denied without prejudice and the issue may be raised in the arbitral forum.

CONCLUSION

American Express's motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against American Express are subject to arbitration, it further orders that plaintiffs' cases against American Express be dismissed. *See Lewis Tree Serv., Inc. v. Lucent Technologies, Inc.*, 239 F. Supp. 2d 332, 340 (S.D.N.Y. 2002) (where "no useful purpose will be served by granting a stay" the action should be dismissed); *see also Wilson v. Wells Fargo Financial Acceptance, Inc.*, No. 3:02-0383, 2003 WL 1877336 (M.D. Tenn. Apr. 9, 2003) (dismissing case in favor of arbitration, and holding that "if all of the issues in dispute are governed by the arbitration agreement, then it would generally be an inefficient use of the court's docket to enter a stay, when the arbitration will likely be dispositive of all the issues").

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[21] "Finally this motion is not about arbitration. No one disputes the strong public policies supporting arbitration or the broad scope of the FAA. This motion, rather, is about Collective Action Waivers, which violate California law because they cut off plaintiffs' rights to participate in *both* class actions *and* class-wide arbitration. In this case, there would be no violation of applicable law if the defendants' agreements allowed small merchants either to participate in class actions or to take part in class-wide arbitrations. The arbitral organizations identified in the defendants' agreements with small merchants all have rules authorizing and governing class-wide arbitration." Pls.' Mem. in Sup. of Mot. for Partial Summary Judgment, 3 (emphasis in original).

American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in *National Supermarket* is denied. The bank defendants' motion to dismiss the claims in *National Supermarket* is denied. The bank defendants' motion to stay the action in *National Supermarket* pending the arbitration of related claims against American Express, is granted.

The *Cohen Rese* plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice.

Dated: March 15, 2006

New York, New York

SO ORDERED:

/s/ GEORGE B. DANIELS

GEORGE B. DANIELS

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of August, two thousand eleven,

Present:

Rosemary S. Pooler[1],
Robert D. Sack,
Circuit Judges.

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
Plaintiffs-Appellants,

v. (06-1871-cv)

AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., AMERICAN EXPRESS CO.,
Defendants-Appellees.

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[1] The Honorable Sonia M. Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 10, 2009. The remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

[filed Aug. 1, 2011]

In light of the Supreme Court's decision of April 27, 2011 in *AT&T Mobility LLC v. Concepcion*, -- U.S. --, 2011 WL 1561956 (2011), this panel is *sua sponte* considering rehearing. No additional briefing is necessary at this time.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ CATHERINE O'HAGAN WOLFE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
Plaintiffs-Appellants,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
Defendants-Appellees.

[Filed May 29, 2012]

ROSEMARY S. POOLER, Circuit Judge, concurs by opinion in the denial of rehearing in banc.

DENNIS JACOBS, Chief Judge, joined by JOSÉ A. CABRANES and DEBRA ANN LIVINGSTON, Circuit Judges, dissents by opinion from the denial of rehearing in banc.

JOSÉ A. CABRANES, Circuit Judge, dissents by opinion from the denial of rehearing in banc.

REENA RAGGI, Circuit Judge, joined by RICHARD C. WESLEY, Circuit Judge, dissents by opinion from the denial of rehearing in banc.

ORDER

Following disposition of this appeal on February 1, 2012, an active judge of the Court requested a poll on whether to rehear the case *in banc*. A poll having been conducted and there being no majority favoring *in banc* review, rehearing *in banc* is hereby **DENIED**.

ROSEMARY S. POOLER, Circuit Judge, concurring in the denial of rehearing en banc:

I respectfully concur in the denial of the rehearing en banc. I write briefly to emphasize that the limited holding in this case is not governed by the Supreme Court's reasoning in *AT&T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). *Concepcion* holds that the Federal Arbitration Act ("FAA") preempts state laws hostile to arbitration, and focuses its analysis on preemption issues. In contrast, analysis in *Amex III* rests squarely on a vindication of statutory rights analysis – an issue untouched in *Concepcion*.

Amex III strives to give full effect to the Supreme Court's teachings that where a contractual agreement functions "as a prospective waiver of a party's right to pursue statutory remedies," then the contractual agreement may not be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, n. 19, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *see also Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). *Amex III* is carefully cabined to

hold that this waiver, on this record, is unenforceable. It creates no broad new rights.

While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights – a significant distinction. In analyzing *Concepcion*, the Court reasoned that although the FAA's saving clause, 9 U.S.C. § 2, preserves a generally applicable contract defense, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S.Ct. at 1748. The Court reasoned that invalidating a class waiver would allow a party to an arbitration agreement to demand a class-wide arbitration that is not consensual, thereby making arbitration slower, more formal and more costly, and greatly increasing risks to defendants. *Id.* at 1750-52. Because its analysis focused wholly on the issue of preemption of state law by federal law, *Concepcion* is silent on the holdings of the Court's earlier cases which enforce arbitration clauses only when those clauses permit parties to effectively vindicate their federal statutory rights.

In stark contrast, *Amex III* raises a different issue: whether the FAA always trumps rights created by a competing federal statute, as opposed to rights existing under a common law of unconscionability. At issue here is not the right to proceed as a class, but the ability to effectively vindicate a federal statutory right that predates the FAA. Vindication of statutory rights analysis is the method of analysis proposed by the Supreme Court in *Mitsubishi* for addressing whether an arbitration clause will be enforced where the dispute implicates a federal statute. 473 U.S. at 6[illegible] 105 S.Ct. 3346; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 114

L.Ed.2d 26 (1991). This analysis is not foreign to our Court. *See, e.g., Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 168 (2d Cir.2002) (analysis of arbitration agreement required finding that agreement "provide[d] adequately for vindication of federal statutory rights"). There is no indication in *Concepcion* that the Supreme Court intended to overrule its previous holdings.

Mitsubishi holds that parties may agree to prosecute statutory rights via arbitration instead of litigation only where "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." 473 U.S. at 637, 105 S.Ct. 3346. *Gilmer* reaffirmed that principle. 500 U.S. at 28, 111 S.Ct. 1647. Nearly ten years later, the Supreme Court cited the proposition again, in *Green Tree Fin. Corp.*, 531 U.S. at 90, 121 S.Ct. 513; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S.Ct. 1456, 1474, 173 L.Ed.2d 398 (2009) (recognizing principle and stating that "a substantive waiver of federally protected civil rights will not be upheld"). Our sister Circuits also engage in a vindication of rights analysis. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir.2006) (severing as unenforceable provision of arbitration agreement limiting availability of treble damages under antitrust statute); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n. 14 (5th Cir.2003) (severing restriction on available remedies from arbitration agreement after finding that "ban on punitive and exemplary damages is unenforceable in a Title VII case"); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 657-60 (6th Cir.2003) (en banc) (deciding when cost-sharing deprives employees of substantive statutory rights); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir.1999) ("an

arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum"); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C.Cir.1997) ("We do not read *Gilmer* as mandating enforcement of *all* mandatory agreements to arbitrate statutory claims; rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.").

Equally unavailing is any reliance on *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir.2012). *Coneff* – like *Concepcion* – examines when the FAA preempts state contract law. Unlike *Amex III*, the *Coneff* court was not focused on individual plaintiffs lacking an effective means of enforcing their rights. Rather, the question addressed in *Coneff* was, given the small damages awards in any individual arbitration, whether the plaintiffs would have an adequate *incentive* to vindicate their rights. The Ninth Circuit expressly recognized the difference between incentive and ability. *Coneff*, 673 F.3d at 1158-60 n. 3 (distinguishing *Amex III*, 667 F.3d 204, 218 (2d Cir.2012) on the ground that in *Amex III* "the *only economically feasible means* for plaintiffs enforcing their statutory rights is via a class action.")(emphasis in original).

Further, in both *Coneff* and *Concepcion* the individual damages awards available to any single plaintiff were small, but fee-shifting provisions ensured that a damaged plaintiff could be made whole. The

reason that a plaintiff may not bring suit was not because he would not be likely to recoup his costs, but rather because the small amount of damages was not worth his trouble. In *Amex III*, however, plaintiffs were faced with substantial upfront expenditures to prosecute their antitrust rights – costs that were only economically feasible if the plaintiffs prosecuted their claims as a class. *Amex I* explained why the Clayton Act's treble-damages and fee-shifting provisions would not make an individual plaintiff whole:

> [Not only is] the trebling of a small individual damages award [] not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more important legal consideration that the district court did not consider. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court addressed fee-shifting for expert witnesses under Rule 54(d) of the Federal Rules of Civil Procedure in an antitrust case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b). . . ." 482 U.S. 437, 439, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). We note that figure is now set at a $40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing,

> and thereby not recovering any fees, in their evaluation of their suit's potential costs.

554 F.3d 300, 317-18 (2d Cir.2009) (footnotes omitted); *see also* 15 U.S.C. § 15.

We need not tarry long in addressing a final concern: that *Amex III* permits plaintiffs to evade enforcement of class action arbitration waivers simply by manufacturing an affidavit or choosing pricey attorneys. The business plaintiffs here are prosecuting antitrust claims that will likely require complex discovery and expert testimony. Other statutory claims may not require such extensive proof. The courts are perfectly capable of doing the analysis necessary to determine if the plaintiffs have made the necessary showing. *See, e.g., Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir.2002) (refusing to strike class arbitration waiver where plaintiff failed to make required showing that he would incur prohibitively high expenses in prosecuting claim individually); *Ornelas v. Sonic-Denver T, Inc.*, 2007 WL 274738, at *6 (D.Colo. Jan. 29, 2007) (refusing to strike class arbitration waiver because the evidence did not demonstrate the costs of pursuing arbitration would effectively "preclude the plaintiff from pursuing his claims"); *see also Bonanno v. Quizno's Franchise Co., LLC*, 2009 WL 1068744, at *16 (D.Colo. April 20, 2009) (enforcing contract clause barring class actions where plaintiffs failed to demonstrate they would incur excessively high costs in proceeding individually). *Amex III* specifically admonishes that each case will need to stand on its own merits.

Amex III gives full effect to a long line of Supreme Court precedent preserving plaintiffs' ability to vindicate federal statutory rights, rather than eviscerating more than 120 years of antitrust law by closing

the courthouse door to all but the most well-funded plaintiffs. For these reasons, I concur in the denial of rehearing en banc.

DENNIS JACOBS, Chief Judge, with whom Judge CABRANES and Judge LIVINGSTON join, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing *in banc*.

In 1968, it became law in this Court that, for public policy reasons, federal antitrust claims could not be arbitrated. *See Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir.1968). The Supreme Court rejected that public policy approach in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). And in 1991, it reiterated that federal statutory claims can be subject to valid arbitration agreements. *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Now the panel opinion in this case uses public policy to hold that arbitration agreements containing class-action waivers are unenforceable when applied to federal statutory claims *if* (as is always so easy to assert) a claim would not be "economically rational" to pursue individually. *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 214 (2d Cir.2012) (*Amex III*). The panel opinion thus impairs the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration by multiplying claims, lawsuits, and attorneys' fees. "[T]he longstanding judicial hostility to arbitration agreements," *Gilmer*, 500 U.S. at 24, 111 S.Ct. 1647, is undiminished.

At issue is a provision, of a kind commonly used in arbitration agreements, that bars class actions. The underlying arbitration involves an antitrust claim. In *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir.2009) (*Amex I*), the panel held that such a bar ran afoul of the federal substantive law of arbitration because the litigation expense of the antitrust suit – expert testimony, in particular – would render separate arbitrations too expensive. So the panel ruled that a class action may proceed in court notwithstanding the agreement to arbitrate. *Id.* at 320. The Supreme Court granted certiorari and vacated *Amex I* in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, —— U.S. ——, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). *Am. Express Co. v. Italian Colors Rest.*, —— U.S. ——, 130 S.Ct. 2401, 176 L.Ed.2d 920 (2010).

Stolt-Nielsen holds that a party to an arbitration agreement cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party *agreed* to do so . . . because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S.Ct. at 1775. On remand the (by then) two-judge panel reached the same conclusion as in *Amex I*. *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 199 (2d Cir.2011) (*Amex II*).

Shortly after *Amex II* was published but before the mandate issued, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), which holds that state law may not be used to invalidate a class-action waiver in an arbitration agreement on the ground

that the only economical way to litigate the claim is through a class action. *Id.* at 1748. After soliciting briefing on the impact of *Concepcion*, the panel issued its third opinion. In *Amex III*, the panel yet again concludes that the class-action waiver is unenforceable on the ground that the only effective way to litigate the antitrust claims was by a class action in court. *Amex III*, 667 F.3d at 218-19.

As I undertake to show, the public policy rationale which *Amex III* relies upon is wrong because: [1] it runs counter to the public policy that the Supreme Court has made paramount in the context of the Federal Arbitration Act ("FAA"); [2] it employs a dubious ground of distinction to overcome *Concepcion*, which teaches that the FAA does not allow courts to invalidate class-action waivers even if "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Concepcion*, 131 S.Ct. at 1753; and [3] the dicta on which the panel precariously relies – that large "arbitration costs" cannot be allowed to prevent a plaintiff from "effectively vindicating" a statutory right – is pulled out of context and distorted.

I

Amex III cannot be squared with the FAA, as it has been applied and explained by the Supreme Court. In banc review is needed because [A] the panel opinion is unbounded and can be employed to defeat class-action waivers altogether; [B] it makes the district court the initial theater of arbitral conflict on the merits (how else does a district court estimate the cost of a litigation?); and [C] it is already working mischief in the district courts.

A

Amex III is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause. While it purports to require a case-by-case approach, its wording is categorical: "Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action." *Amex III*, 667 F.3d at 214. Thus every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss.

The breadth of the holding is illustrated in the opinion. *Amex III* uncritically adopts the affidavit of a paid consultant to find that expert costs would be so high relative to potential damages, that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action [in court]." 667 F.3d at 218.

However, Section 4 of the Clayton Act provides for the recovery of costs, including expert costs, and attorneys' fees. *See* 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). The *Amex* panel is evidently of the view that the incentivizing fees and cost afforded by the statute would not fully compensate plaintiffs

for the costs of pursuing their claims. *See Amex III*, 667 F.3d at 218. But Congress deems these incentives sufficient to encourage private suits. The judgment of Congress in such a matter is entitled to deference, not the panel opinion's dismissive treatment.

Amex III does not vouchsafe what is meant for a suit to be "economically feasible," or when a hypothetical "economically rational" plaintiff might be willing to pursue a claim. *Id.* at 218. It cannot mean that a potential plaintiff must have the opportunity to be made whole and happy by recovery of damages, costs, attorneys' fees, expert charges, etc., because such a result is rarely achieved by even the most successful litigants. Moreover, *Amex III* demands more than such complete victory; it demands a "risk-of-losing" premium. *Id.* at 218 ("Even with respect to reasonable attorney's fees [,] . . . the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs."). This formulation betrays a dominant consideration – that, without the class-action vehicle, no lawyer will be incentivized to pursue these claims. That may be; but *Concepcion* rejected this very policy rationale. *See Concepcion*, 131 S.Ct. at 1753 (rejecting argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," because rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons"); *see also Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir.2012) (rejecting argument that plaintiffs had insufficient incentive to pursue individual claims as "primarily a policy rationale" that "cannot undermine the FAA").

B

Under the panel opinion, arbitration must now begin in federal court – and be litigated there on the merits in many critical respects. The courtroom inquiry that the panel requires to be undertaken before any class arbitration can in fact take place is searching. Whether a dispute may require expert testimony is a question inseparable from the merits (and raises *Daubert* and other vexed questions). Without a close inquiry into the merits, no court can decide what expert testimony would be required, or how much discovery is needed. And it cannot be decided whether any discovery or testimony is needed at all without deciding if the claim is dismissible – or such prior questions as the statute of limitations and laches, controlling law, res judicata, etc., etc., not to mention little things like whether the putative class is duly constituted and properly represented, without which there is no class claim.

Under the FAA, however, all those questions are for the arbitrator to decide. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). By requiring the district court to consider this at the threshold, *Amex III* effectively displaces arbitration with a trial court proceeding whenever lawyers assert a class claim. (And they will, often.) Even if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. And the partial list of issues above will create fertile ground for appeal, adding yet more delay, expense, and uncertainty. The predictable upshot is

that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes.

Amex III is incompatible with the FAA. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 & n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The federal substantive law of arbitration "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Id.* at 24, 103 S.Ct. 927. This is particularly true in light of *Concepcion*'s reaffirmance of the "overarching purpose" of the FAA:

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concepcion, 131 S.Ct. 1740.

C

In the six years *Amex* has been pending in this Court, its several iterations have been relied upon no fewer than three times in the Southern District of New York alone. *See Raniere v. Citigroup, Inc.*, 827 F.Supp.2d 294, —— (S.D.N.Y.2011); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950, 2011 WL 2671813, at *2-5 (S.D.N.Y. July 7, 2011); *Sutherland v. Ernst & Young, LLP*, 768 F.Supp.2d 547, 550-54

(S.D.N.Y.2011).[1] Given the recurrent influence of *Amex*, this Court should subject it to *in banc* review.

That responsibility is even more compelling because the panel opinion now splits with a recent holding of the Ninth Circuit Court of Appeals. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n. 2, 1159 n. 3 (9th Cir.2012). In *Coneff*, a putative class of AT&T wireless customers sued AT&T on a variety of claims, including a violation of the Federal Communications Act. *Id.* at 1157. The Ninth Circuit held that *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), was no obstacle to the enforcement of the arbitration agreement containing a class-action waiver because under the FAA it is irrelevant whether customers "have insufficient incentive" "to vindicate their rights." *Id.* at 1159 (citing *Concepcion*, 131 S.Ct. at 1753).

II

Amex III is thus incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements. It should come as no surprise, then, that the panel opinion finds no support in the Supreme Court's case law. Instead, *Amex III* proceeds by selective quotation from Supreme Court dicta, and by aggressive measures to distinguish away the Supreme Court's recent holding in *Concepcion*.

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[1] These three cases also happen to be the only citations in *Amex III* that support its "vindication of rights" analysis. *See Amex III*, 667 F.3d at 219. This is of course self-referential: the citation of Second Circuit opinions by the district courts of this Circuit is not a form of endorsement.

A

Concepcion, decided after the second iteration of *Amex*, vindicated the FAA against an unconscionability challenge that was materially indistinguishable from the challenge upheld in *Amex*. In *Concepcion*, the Supreme Court rejected a common-law rule, developed by the California Supreme Court, that was applied to void class-action waivers in contracts of all types. This is what the discredited California opinion had said:

> [B]ecause . . . damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.

Discover Bank v. Superior Court, 36 Cal.4th 148, 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005) (internal quotation marks, citations, and alterations omitted).

The Supreme Court ruled that this attempt by California to police arbitration agreements was inconsistent with the FAA. *Concepcion*, 131 S.Ct. at 1748. Refuting the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the majority affirmed that rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons." *Id.* at 1753.

After the *Amex* panel solicited briefing from the parties on the effect of *Concepcion*, the panel reissued *Amex* (in the form of *Amex III*), evading the broad language and clear import of *Concepcion*. Again in *Amex III*, the panel found that a class-waiver provision in an arbitration agreement is unenforceable if "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Amex III*, 667 F.3d at 218.

Amex III tries to narrow *Concepcion* to (in the words of *Amex III*) a "path for analyzing whether a state contract law is preempted by the FAA." *Amex III*, 667 F.3d at 213. In so doing, *Amex III* conceives the following distinction: *Concepcion* decided only whether California's doctrine of unconscionability was preserved by the FAA's savings clause for "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, whereas *Amex III* invalidates the arbitration agreement (for the same reason of unconscionability) on the ground that the underlying antitrust claim was federal, a circumstance that the panel dresses up rhetorically as a "federal substantive law of arbitrability," *Amex III*, 667 F.3d at 213 (quotation marks omitted). This labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded. Since, as the Supreme Court has held, the FAA preempts even state law that permits evasion of a class action waiver clause, it is hard for me to see any justification for a rule permitting *precisely* the same sort of evasion as part of the "federal substantive law of arbitrability."

B

The panel opinion leans on the distortion of dicta from *Green Tree Financial Corp. v. Randolph*, 531

U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). In *Green Tree*, a lender sought to compel a borrower to arbitrate claims she had raised under certain federal statutes. *Id.* at 83, 121 S.Ct. 513. The question was "whether [her] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." *Id.* at 89, 121 S.Ct. 513. The Court reconfirmed "that federal statutory claims can be appropriately resolved through arbitration," *id.* at 89, 121 S.Ct. 513, and "rejected generalized attacks on arbitration that rest on a 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants,'" *id.* at 89-90, 121 S.Ct. 513 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). And the challenge failed for want of evidence of the "cost" of the arbitration. *Id.* at 90, 121 S.Ct. 513.

A passage in dicta (relied upon in *Amex III*) added that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." *Id.* at 90, 121 S.Ct. 513. However, "large arbitration costs" is not a reference to expense generally. *Green Tree* uses the phrase to reference the cost of access to an arbitral forum and is about the price of admission: "payment of filing fees, arbitrators' costs, and other arbitration expenses." *Green Tree*, 531 U.S. at 84, 121 S.Ct. 513. Only *Amex III* has suggested that a claim that may be expensive to litigate – whether in court *or* in arbitration – can for that reason be deemed to entail preclusive "arbitration costs." In any event, even if the *Green*

Tree dicta were to have the meaning the panel ascribes to it, it is nonetheless still dicta. And it loses any persuasive power it might once have had in light of the Supreme Court's holding in *Concepcion*, which is more clear and more recent – and authoritative.

Similarly misleading is the panel's quotation of *Mitsubishi*, for the proposition that "should clauses in a contract operate 'as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.'" *Amex III*, 667 F.3d at 214 (quoting *Mitsubishi*, 473 U.S. at 637 n. 19, 105 S.Ct. 3346). The Court was there concerned with a hypothetical arbitral panel that might, relying on provisions concerning choice of forum or choice of law, refuse to apply American law to a federal statutory claim. *Mitsubishi*, 473 U.S. at 637 n. 19, 105 S.Ct. 3346.

Other circuit cases have excised provisions from arbitration agreements for the precise reasons anticipated by *Green Tree* and *Mitsubishi*. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir.2006) (severing waiver of treble damages); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n. 14 (5th Cir.2003) (noting that waiver of exemplary and punitive damages is unenforceable); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.1998) (holding that arbitration agreement cannot force a party to arbitrate a statutory right and at the same time bar it from being awarded damages in the arbitral forum). All of these three cases involved an arbitration agreement that entirely foreclosed a *remedy* to which one of the parties was otherwise entitled to seek at law. None of them invalidated an arbitration

agreement on the ground that the claims were costly to litigate individually.[2]

In *Amex*, there is zero evidence that any "arbitration costs" – within the meaning of *Green Tree* – would hamper the plaintiffs' ability to vindicate their statutory rights. None of the three panel opinions references the size of the filing fees, or any arbitrators' fees that would befall the plaintiffs. In finding that claim-by-claim litigation would not be "economically feasible," *Amex III*, 667 F.3d at 204, the panel relies solely on the affidavit of a paid consultant, Gary French, who opined that preparing an antitrust study would cost "at least several hundred thousand dollars, while a larger study can easily exceed $1 mil-

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[2] *Amex III* asserts that "[o]ther Circuits permit plaintiffs to challenge class-action waivers on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right," *Amex III*, 667 F.3d at 216-17 (citing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir.2007)); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 555, 557 (7th Cir.2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502-03 (4th Cir.2002). Each of those opinions quotes the "prohibitive costs" passage of *Green Tree*, but none uses the phrase as *Amex III* uses it – and all find in favor of the party seeking to enforce the arbitration clause. For one thing, the plaintiffs in each case failed to provide non-conclusory cost evidence. Notably, in *Livingston* and *Adkins* (upon which *Cotton Yarn* relies) the plaintiffs had raised the specter of prohibitive arbitration fees – not expenses incident to litigation. *See Livingston*, 339 F.3d at 557 ("Tellingly, [plaintiffs'] only 'evidence' of prohibitive arbitration costs is an unsubstantiated and vague assertion that discovery in an unrelated arbitration matter disclosed fees of nearly $2,000 per day."); *Adkins*, 303 F.3d at 503 ("[Plaintiff] does not even provide any evidence about the most basic element of this challenge: the size of the allegedly 'prohibitive' arbitration fee itself."). These cases were thus concerned about the price of admission.

lion." *Id.* at 212.[3] His preliminary review of the particular claim yielded a guess of nearly one million dollars. *Id.* However, that is beside the point: The ability to spread costs among a class is only a procedural right, the absence of which cannot render arbitration costs prohibitive. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), is instructive: an employee sought to avoid arbitrating his ADEA claims on the ground that "arbitration is inconsistent with the ADEA." *Id.* at 30, 111 S.Ct. 1647. The Supreme Court characterized that argument as "rest[ing] on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants, and as such, . . . far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* (internal quotation marks omitted).

Gilmer's argument about the unavailability of class actions was expressly rejected:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. . . . But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

---

[3] It evidently did not occur to French or the panel that the rules of evidence do not govern arbitration, and that an arbitrator can consult treatises and articles for relevant antitrust and economic principles, and should do so in some cases.

Id. at 32, 111 S.Ct. 1647 (internal quotation marks omitted). As the passage from *Gilmer* reflects, the ADEA expressly provides for a collective action; *a fortiori*, the same result obtains under the antitrust laws, which do not. The only right to an antitrust class action is "merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir.2000) (enforcing, due to absence of congressional intent to the contrary, a bilateral arbitration clause "even though [such clauses] may render class actions to pursue statutory claims . . . unavailable").

JOSÉ A. CABRANES, Circuit Judge, dissenting from the denial of rehearing in banc:

I concur fully in the thorough opinion of Chief Judge Jacobs dissenting from the denial of *in banc* review. I write separately simply to underscore that the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review. This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.

REENA RAGGI, Circuit Judge, with whom Judge WESLEY joins, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of *en banc* review in this case. The panel decision to hold a class action waiver unenforceable is at odds with *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir.2012). This circuit split appears unwarranted in light of controlling Supreme Court precedent for the reasons

forcefully advanced by Chief Judge Jacobs in his opinion dissenting from the denial of rehearing *en banc*. While I identify much merit in the Chief Judge's analysis, I do not join in his opinion because I think it would be useful to have the issues explored further by the full court in the adversarial context of an *en banc* argument. To the extent a majority of the court maintains this circuit split without further consideration, I must dissent.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be

served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

May 24, 2011

Mr. Michael K. Kellogg
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036-3209

Re: American Express Company, et al.
v. Italian Colors Restaurant, on or Behalf of
Itself and All Similarly Situated Persons, et al.
Application No. 10A1146

Dear Mr. Kellogg:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on May 24, 2011 extended the time to and including August 5, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by KYLE R. RATLIFF

Kyle R. Ratliff
Case Analyst

[attached notification list omitted]

OPPOSITION BRIEF

NO. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

This Court has repeatedly recognized that federal statutory claims may be appropriately resolved through arbitration "so long as the prospective litigant effectively may vindicate [its] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). The question presented—on which there is no disagreement in the circuits—is whether an arbitration clause should be enforced when there is no dispute that a litigant has shown that it would be unable effectively to vindicate its federal statutory rights in the arbitral forum.

CORPORATE DISCLOSURE STATEMENT

The respondents are Italian Colors Restaurant, 429 Supermarkets Corp., Bunda Starr Corp. d/b/a Buy-Rite, Chez Noelle Restaurant Corp., Cohen Rese Gallery, Inc., DRF Jewelers Corp., Il Forno, Inc., Mai Jasmine Corp., Mascari Enterprises d/b/a Sound Stations, Mims Enterprises, Inc. d/b/a Mims Restaurant, National Supermarkets Association, Inc., and Phuong Corp. None of the respondents has a parent company. No publicly held company owns 10% or more of any one respondents' stock.

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INTRODUCTION

For a quarter century, this Court has recognized that federal statutory claims may be resolved through arbitration under the Federal Arbitration Act (FAA) only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). That requirement harmonizes the FAA's general pro-arbitration policy with the specific federal statutory protections at stake in a given case. And it ensures that the FAA serves its purpose of resolving claims in an alternative forum, not exterminating them. In this way, the requirement safeguards arbitration's legitimacy and the public's confidence in it.

Accordingly, this Court has held that "where, as here, a party [contends] that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000). The possibility of carrying that burden through a fact-bound showing has never been doubted. Every regional circuit has recognized this possibility while imposing a very high bar.

The decision below is no different. It held that respondents satisfied their heavy burden under *Randolph* because they proved they could not vindicate their federal antitrust claims under the arbitration clause without incurring non-recoverable costs that would dwarf each claimant's possible recovery many times over. Only one other circuit has addressed similar facts, and it reached the same conclusion. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). Under these limited circumstances, the decision below correctly concluded that enforcing the arbitration clause would grant petitioners "de facto immunity" from federal antitrust law. Pet. App. 12.

That fact-bound application of settled law does not conflict with any of this Court's cases. The preemption principles applied in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), govern the relationship between *state* contract law and *federal* arbitration law, not the FAA and the Sherman Act. Nothing in *Concepcion* purported to overrule or limit the effective-vindication doctrine. And no circuit has concluded otherwise.

Manufactured conflicts aside, the thrust of both the petition and Judge Jacobs's dissent is their speculation that the decision below will be successfully invoked by plaintiffs in other cases to circumvent *Concepcion*. But support for that speculation is nonexistent, and the evidence against it is mounting. Indeed, the very case petitioners portray as creating a split, *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), shows otherwise. Far from disagreeing with the decision below, *Coneff* distinguished it on its facts, explaining that *Randolph*'s burden cannot be met in the mine run of cases in which consumers and employees can possibly vindicate their claims in arbitration. But that possibility, as *Coneff* recognized, does not exist in this case. There is no reason to believe lower courts are incapable of distinguishing run-of-the-mill class actions—in which plaintiffs contend merely that their *incentives* to arbitrate are insufficient—from the truly rare case in which the evidence satisfies *Randolph*'s heavy burden.

That burden is even less likely to be satisfied in future cases because of the ongoing evolution of arbitration agreements, which increasingly include pro-claimant features designed to facilitate the effective vindication of complex statutory claims. This Court should allow that evolution to run its course rather than rush in to fix a problem that does not, and may never, exist.

STATEMENT

1. Respondents are merchants who sued American Express (Amex) for violations of federal antitrust law. The crux of their complaint is that Amex compels merchants to accept Amex-branded mass-market credit cards, including bank-issued cards, as a condition of accepting Amex corporate and premium charge cards. Respondents assert that Amex has monopoly power in the markets for corporate and premium cards, and that it uses that power to force merchants to accept ordinary credit cards at rates that are 30% higher than the fees for identical bank-issued cards in competing networks (*e.g.*, Visa and MasterCard).

This practice, which respondents attack as an unlawful tying arrangement under the Sherman Act,[1] has had specific and provable anticompetitive effects in the market for ordinary credit-card acceptance. Specifically, it has allowed Amex to offer banks vastly higher "interchange" fees than Visa and MasterCard. That, in turn, has driven those companies to raise their own interchange fees to avoid losing bank issuers to Amex. The

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[1] "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product .... Such an arrangement violates § 1 of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992) (citation and internal quotation marks omitted). For an arrangement to be unlawful under Second Circuit precedent, plaintiffs must additionally demonstrate a substantial likelihood of harm to competition in the tied product market, *see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 133 n.5 (2d Cir. 2001), which respondents here seek to show by proving actual harm to competition.

result has been an upward spiral in interchange fees without the downward price competition that normally exists in competitive markets. This breakdown of normal competitive forces in the credit-card-acceptance market has prompted, in addition to this case, a merchant class action against Visa and MasterCard that recently settled for significant injunctive and monetary relief.[2] In addition, the Department of Justice brought enforcement actions against Visa, MasterCard, and Amex that complement the injunctive relief sought in the merchant class cases.[3]

Prosecuting respondents' tying case is no small task. It is uncontested that respondents cannot prosecute their claim without at least one detailed antitrust market study. Pet. App. 25-27. It is also uncontested that the study in this case will be "necessarily complex and costly" because it will require specific determinations concerning:

- the relevant "tying" and "tied" product markets and whether they are distinct from one another;
- whether Amex has monopoly market power in the "tying" product market;

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[2] *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-md-1720 (E.D.N.Y), Doc. No. 1588; *see also* Christie Smythe and Dakin Campbell, *Visa, MasterCard Settle Merchants' Swipe-Fee Lawsuit*, Bloomberg News (July 14, 2012), *available at* http://www.bloomberg.com/news/2012-07-13/visa-mastercard-settle-merchants-antitrust-swipe-fee-suit.html.

[3] *See United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y.). The United States entered into consent decrees with Visa and MasterCard, *id.* Doc. No. 4, and continues to litigate against American Express.

- whether Amex has exercised its monopoly market power to enforce the tying arrangement;
- whether the tying arrangement has had discernable anticompetitive effects in the "tied" product market;
- what the merchant fees would have been but for the anticompetitive tying arrangement; and
- the dollar amount of the damages to the individual claimant as a consequence of the tying arrangement.

Id. at 87-88. Given these complex and time-consuming inquiries, respondents' evidence shows that the cost of conducting the market study—which is not recoverable even if respondents prevail—is "at least several hundred thousand dollars" and could "easily exceed $1 million." *Id.* at 87. This total dwarfs, many times over, the recovery that any individual plaintiff could hope to obtain—approximately $5,252 for the "median volume" claimant and $38,549 for the largest volume claimant. *Id.* at 89.

2. Based on this evidentiary showing, which petitioners did not contest, respondents opposed arbitration in the district court on the ground that they would be unable to effectively vindicate their federal statutory rights under the specific arbitration agreement here.

The arbitration agreement in this case is eight years old. It provides no mechanism for either sharing or reimbursing the costs of the market study. It precludes the spreading of costs among claimants even in separate arbitrations by prohibiting the sharing of "any information relating to ... the arbitration proceedings." *Id.* at 92. And it contains no other provisions—like the consumer-friendly provisions examined by this Court in *Concepcion*—that might allow respondents to effectively vindi-

cate their claims. In addition, the arbitration agreement prevents claimants from seeking relief "on behalf of ... other [merchants]," *id.* at 67—meaning that it precludes the possibility of obtaining the kind of market-wide injunctive relief that is often necessary to remedy systemic anticompetitive conduct.

Respondents argued that forcing them to pursue their claims in arbitration would, under the particular circumstances of this case, "impose such punishing costs" on each claimant—much of them non-recoupable—"as to preclude vindication" of their rights under the Sherman Act. *Id.* at 108. The district court held that this question should be resolved by the arbitrator, not the court, and granted petitioners' motion to compel arbitration. *Id.* at 123.

3. The Second Circuit reversed. After determining that the enforceability of the arbitration clause was "plainly" a question for the court to decide, *id.* at 75, the Second Circuit analyzed that question under the framework set forth by this Court in *Randolph*, which held that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92.

Applying that test to the specific facts of the case, the Second Circuit held that respondents met their heavy burden. The court found that the "uncontested" record evidence before it—like the "similar" evidentiary showing made by the plaintiffs in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006)—established that respondents "would incur prohibitive costs if compelled to arbitrate" because the non-recoverable per-claimant costs of bringing their claims in arbitration (as opposed to ag-

gregate proceedings in court) would exceed their expected individual recoveries many times over. Pet. App. 86-91 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (reimbursement of expert witness fees capped by federal statute at $30 per witness per day)). The court therefore held that the arbitration clause could not "be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing [respondents'] only reasonably feasible means of recovery"—"the aggregation of individual claims." *Id.* at 89, 95.

At the same time, the Second Circuit emphasized the limited scope of its opinion. It explained that it was not holding that arbitration clauses "are *per se* unenforceable in the context of antitrust actions," but only that—consistent with this Court's approach in *Randolph*—"*each* case" presenting the question "must be considered on its own merits, governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal policy favoring arbitration agreements.'" *Id.* at 97 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

4. This Court granted certiorari, vacated the Second Circuit's opinion, and remanded for further consideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). *Stolt-Nielsen* characterized the differences between bilateral arbitration and class arbitration as "fundamental," and therefore held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775-76.

On remand, the Second Circuit agreed with petitioners that *Stolt-Nielsen* would "plainly preclude[] [the

court] from ordering class-wide arbitration." Pet. App. 55. But the Second Circuit explained that it "did not do so" in its previous opinion. *Id.* Any class proceedings would take place in the district court, not in arbitration. The Second Circuit thus concluded that *Stolt-Nielsen* did not alter the outcome of its prior decision. *Id.*[4]

5. After this Court decided *Concepcion*, the Second Circuit again reconsidered its decision, this time on its own initiative. *Id.* at 125-26. The Second Circuit read *Concepcion* and *Stolt-Nielsen* as "stand[ing] squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"—whether by state law or by the FAA—"unless the parties agree to class action arbitration." *Id.* at 16. The court observed that neither case mentioned *Randolph* or addressed whether an arbitration clause "is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." *Id.* at 15, 24.

Tackling that question, the Second Circuit again applied *Randolph* and reached the same conclusion: "The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 25. The court therefore concluded that, based on the specific record before it, the "arbitration clause is unenforceable." *Id.* at 30. Were the

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[4] Justice Sotomayor was a member of the panel when the Second Circuit first decided the case. By the time the panel reconsidered its opinion in light of *Stolt-Nielsen*, she had been elevated to this Court.

clause enforced, the court held, "it would strip the plaintiffs of rights accorded them by statute." *Id.*

At the same time, the Second Circuit stressed the uphill battle facing plaintiffs who seek to invalidate arbitration clauses based on the effective-vindication principle. Pointing to several cases in which plaintiffs' arguments under *Randolph* were rejected, the Second Circuit made clear that these "failures speak to the quality of the evidence presented, not the viability of the legal theory." *Id.* at 24-25. That "plaintiffs so often fail" in these attempts "demonstrates that the [necessary] evidentiary record ... is not easily assembled, and that the courts are capable of the scrutiny such arguments require." *Id.* at 25.

REASONS FOR DENYING THE PETITION

The decision below is consistent with this Court's cases, creates no circuit split, and does not warrant review. This Court has repeatedly recognized that a litigant's ability to effectively vindicate its rights is a precondition to the arbitration of federal statutory claims. The decision below is an application of that well-established principle. It is based on respondents' specific, unrebutted submissions demonstrating the impossibility of prosecuting their antitrust claims in arbitration.

Nothing in *Concepcion*—which considered FAA preemption of contrary state-law principles—calls into question this Court's longstanding effective-vindication rule. To the extent that plaintiffs in future cases may be more inclined to test the limits of the effective-vindication rule as a consequence of *Concepcion*, that concern is not raised by this case, which was brought years before *Concepcion*.

Every circuit court to address the issue—both before and after *Concepcion*—has followed the same approach

as the decision below. Those courts have recognized the effective-vindication rule and have required litigants to meet the heavy burden set forth in *Randolph*. *See, e.g.*, *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.) (under *Randolph*, a party may "resist[] arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights," but that party "bears the burden of showing the likelihood of such interference"); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502-03 (4th Cir. 2002) (Wilkinson, J.) (plaintiff did not "come close" to satisfying burden under *Randolph*).

Not surprisingly, that burden is almost never met. The rare instance presented here—where it is undisputed that respondents have successfully shown that the prohibitive costs of proving an unlawful tying arrangement in arbitration would foreclose the vindication of their federal antitrust rights—does not indicate a split. Quite the contrary. One other decision has applied the same rule to reach the same conclusion on similar facts, *see Kristian*, 446 F.3d at 54-59, while other decisions have applied the same rule to reach different conclusions on materially different facts.

Indeed, *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), the case on which petitioners premise their supposed split, expressly recognized the effective-vindication rule, held that the rule survives *Concepcion*, and concluded that the plaintiffs there (unlike respondents here) failed to satisfy their burden. There is no circuit split for this Court to resolve.

This case neither evades nor disrupts settled doctrine. The decisions in the courts of appeals illustrate that the effective-vindication rule is well settled but infrequently met. And the decision below has not lowered that high bar. If the circuits begin to depart from the

narrow path they have charted under *Randolph*, there will be time enough to review those cases.

I. The Decision Below Does Not Conflict With This Court's Cases.

1. For much of the twentieth century, this Court took the view that federal statutory claims could never be appropriately channeled into arbitration. *See Wilko v. Swan*, 346 U.S. 427 (1953). In a series of cases beginning in 1985 with *Mitsubishi*, however, the Court recognized that federal statutory claims are appropriately subject to arbitration under the FAA because, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but "submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628; *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (same) (overruling *Wilko*). Arbitration's ability to resolve federal statutory claims thus rests critically on the assumption that "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637.

Since *Mitsubishi*'s recognition of this rule in a case under the Sherman Act, the Court has repeatedly reaffirmed the fundamental importance of the effective-vindication principle to the arbitrability of various federal statutory claims. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court found no "inherent inconsistency" between arbitration and the "important social policies" furthered by the Age Discrimination in Employment Act; "the statute will continue to serve both its remedial and deterrent function," the Court held, "'[s]o long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum.'" 500 U.S. 20, 27-28 (1991) (brackets omitted) (quoting *Mitsubishi*,

473 U.S. at 637). And in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, Justice Kennedy's majority opinion reiterated that the Court "would have little hesitation in condemning" an arbitration agreement that prevented the effective vindication of statutory rights. 515 U.S. 528, 533 (1995) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).[5]

The Court made the same point again in *Randolph*, in upholding an agreement to arbitrate a claim under the Truth in Lending Act (TILA). Like *Gilmer*, *Randolph* explained that the FAA does not eviscerate other federal statutory protections: "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." 531 U.S. at 90 (brackets and internal quotation marks omitted). That narrow rule harmonizes the FAA's general policy in favor of arbitration with the specific federal statutory protections asserted in a given case.

Most recently, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), this Court reinforced the vitality of the effective-vindication doctrine. *Pyett* recognized that arbitration agreements may not prevent claimants "'from effectively vindicating' their 'federal statutory rights in the arbitral forum,'" but the Court compelled arbitration

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[5] Petitioners contend that *Vimar Seguros* supports *their* view because the Court in that case found that federal statutory rights could potentially be vindicated in arbitration and thus deferred review until the award-enforcement stage. *See* Pet. 21 n.13. But there is no dispute that respondents here will be unable to vindicate their federal statutory rights in arbitration. Award-enforcement review would be meaningless here, and petitioners tellingly do not contend otherwise.

because the concern there was unduly speculative. *Id.* at 273 (quoting *Randolph*, 531 U.S. at 90).

Petitioners repeatedly dismiss this Court's effective-vindication rule as dictum, but *Randolph* applied the rule to the particular facts at hand. 531 U.S. at 90-92. The plaintiff there argued that potentially high arbitration costs rendered her TILA claim incapable of being effectively vindicated in arbitration. Recognizing that "large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum," the Court adopted a framework to address that possibility: "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. Under that framework, the Court found that Randolph failed to meet her burden because her agreement was silent on costs and she made no showing as to whether (and to what extent) she would in fact be required to pay arbitration costs, making her argument "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91-92.

In the 12 years since *Randolph*, every regional circuit has recognized and applied this rigorous inquiry.[6] The

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[6] *See, e.g.*, *Kristian*, 446 F.3d at 54-59 (1st Cir. 2006); Pet. App. 22-25; *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 216-17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556-57 (4th Cir. 2001); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658-60 (6th Cir. 2003) (en banc); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 566-67 (8th Cir. 2007); *Coneff*, 673 F.3d at 1158 & n.2 (9th Cir. 2012); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 780 (10th Cir. 2010); *Musnik v. King Mo-*

(continued ...)

Second Circuit below did so as well. It held that respondents cleared *Randolph*'s high bar because they had made a successful and uncontested evidentiary showing that the non-recoverable expenses each claimant would incur in arbitration would be so high, and would so outstrip their individual recovery amounts, that compelling arbitration would effectively deprive them of their federal antitrust rights. *See* Pet. App. 25-27.

Petitioners do not deny any of this. They do not deny that respondents made a successful showing that the arbitration agreement here, by precluding the sharing of non-recoverable costs among claimants, strips them of any "economically feasible means for ... enforcing their statutory rights." *Id.* at 27. Rather, petitioners argue that this is beside the point. Advancing a theory that not a single court has accepted, petitioners contend that the effective-vindication doctrine should apply only to a subset of cases in which the cost of arbitration would be prohibitive: namely, those in which "costs unique to arbitration—such as filing fees, the arbitrator's fees, and other administrative fees imposed by the arbitral forum— ... might be so high as to preclude access to the arbitral forum." Pet. 18-19. But the prohibitively expensive per-claimant costs necessary to prosecute respondents' claims in this case *are* unique to arbitration because each claimant would be forced to pay those costs under Amex's arbitration agreement (which precludes any cost-sharing) but would not be forced to do so in aggregate proceedings outside of arbitration.

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tor Co. of Fort Lauderdale, 325 F.3d 1255, 1259-60 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001). The Federal Circuit has not considered the issue.

In any event, petitioners' novel argument misconstrues *Randolph*, finds no support in this Court's cases, and stands the effective-vindication doctrine on its head. By its plain terms, *Randolph* applies whenever "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive." 531 U.S. at 92. Although respondents squarely fit that description, petitioners urge this Court to resist that conclusion. Selectively quoting language from *Randolph* in which the Court was addressing the particular set of facts before it, petitioners assert that because the plaintiff there was challenging arbitration *fees* (*e.g.*, the "filing fee," "arbitrator's fee," and "administrative fees," *see id.* at 90 & n.6), *Randolph* governs only challenges to arbitration clauses that are based on fees. But nothing in *Randolph* warrants this crabbed reading. The analysis in *Randolph* was driven by the recognition that the costs of arbitration could be prohibitively expensive in the context of a particular case and thus foreclose the vindication of federal rights, not by the precise nature of the expenses.

Notably, not a single circuit has adopted petitioners' proposed limitation on *Randolph*. As the Fourth and Sixth Circuits have held in applying the effective-vindication rule, "[t]he proper inquiry ... is not where the money goes"—whether to an arbitrator or to an expert witness—"but rather the amount of money that ultimately will be paid by the claimant" under the arbitration agreement. *Bradford*, 238 F.3d at 556; *Morrison*, 317 F.3d at 660. The case petitioners cite to support their view, *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009) (Boudin, J.), in fact says just the opposite. The First Circuit there stressed that the "concern about fees is ... *not necessarily the only basis* for [the plaintiffs'] claim that *in practical effect* they have no real op-

portunity to get issues ... resolved in arbitration," and then remanded the case to the district court to decide whether "excessive arbitration costs deprive the plaintiff of an arbitral forum." *Id.* at 12-13 (emphasis added). Indeed, *Awuah* expressly reaffirmed the First Circuit's holding in *Kristian* that "[i]f arbitration prevents plaintiffs from vindicating their rights, it is no longer a 'valid alternative to traditional litigation.'" *Id.* at 12 (quoting *Kristian*, 446 F.3d at 37).

Petitioners' proposed limitation on *Randolph*, moreover, would eliminate any safety valve for the rare case in which a plaintiff is truly unable to vindicate its federal statutory rights in arbitration because of a structural barrier such as the inability to share costs. This outcome would have a destabilizing effect on the integrity of, and public confidence in, the alternative dispute resolution process as a whole. The "arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights." *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (citation omitted).

The decision below is consistent with this Court's long line of effective-vindication cases. Petitioners' desire to alter that case law is no reason to grant the petition.

2. This Court's decision in *Concepcion* did not undermine the effective-vindication rule. That decision neither implicated nor mentioned the rule. *Concepcion* addressed whether and to what extent the FAA preempts contrary state contract law. The Court held that "nothing in [the FAA] suggests an intent to preserve state-law

rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1748. Those objectives, the Court explained, are to ensure that private arbitration agreements are enforced according to their terms and to allow for efficient, streamlined procedures tailored to the type of dispute. *Id.* at 1748-49. The Court held that California's contract law obstructed those objectives because it allowed a party to demand nonconsensual class arbitration, thereby making arbitration less efficient, while greatly increasing risks to defendants. *Id.* at 1750-52.

Concepcion is thus not "controlling precedent in this case." Pet. 13. This case concerns the harmonization, in the context of a particular factual setting, of two federal statutes—the FAA, which embodies a federal policy favoring the resolution of claims through arbitration, and the Sherman Act, in which "the private cause of action plays a central role," *Mitsubishi*, 473 U.S. at 635. As to that question, this Court's effective-vindication cases—not *Concepcion*—supply the answer. *Concepcion* did not discuss and does not impact those longstanding precedents. Moreover, the plaintiffs in *Concepcion* were pursuing only *state-law* claims. And the Court stressed that the plaintiffs *would* be able to vindicate those claims. Under the distinctive pro-consumer features of AT&T Mobility's arbitration clause, "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole," making the claims at issue "most unlikely to go unresolved." 131 S. Ct. at 1753 (citation omitted).

Petitioners' attempt to cast this case as one about class arbitration is a fluorescent red herring. As the Second Circuit observed, "*Concepcion* and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-

action arbitration unless the parties agree to class action arbitration." Pet. App. 16. The Second Circuit did not compel class arbitration—to the contrary, it recognized that it had no authority to do so—and the effective-vindication doctrine does not require that parties submit to such a proceeding. Nor did the Second Circuit condition the enforceability of the arbitration agreement on the availability of class arbitration. What it *did* insist upon is that, taking into account the circumstances of the particular case, the claimants have *some* means of vindicating their federal statutory rights—whether through the cost-sharing that attends aggregate proceedings, or through the pro-claimant features provided in more recently drafted arbitration agreements, or by any other means. "At issue here is not the right to proceed as a class, but the ability to effectively vindicate a federal statutory right that predates the FAA." Pet. App. 129 (opinion of Pooler, J.).

II. There Is No Circuit Split.

Lacking a conflict with this Court's cases, petitioners attempt to create one in the circuits. But as discussed above, every circuit that has addressed a prohibitive-costs argument, both before and after *Concepcion*, has applied the same framework as the decision below. And they have done so strictly, with a healthy regard for the strong federal policy in favor of arbitration, thereby ensuring that the test has been satisfied very rarely. That this case presents one of those rare occasions is not evidence of a circuit split; to the contrary, it demonstrates that the circuits' development of the *Randolph* test has been carefully calibrated. Indeed, *Coneff*, which petitioners hold up as creating their alleged split, actually signals agreement, not conflict, among the circuits. That case recognized the effective-vindication doctrine, held

that the doctrine survives *Concepcion*, and expressly distinguished the decision below on the facts.

The decision below is also consistent with the circuits that have considered a challenge to an arbitration clause based on the particular argument made by respondents here—namely, that the per-claimant costs of arbitration, as opposed to the cost-spreading possible in aggregate litigation, would be so high as to preclude the effective vindication of federal statutory rights. *See, e.g.*, *Kristian*, 446 F.3d at 54-59; *Coneff*, 673 F.3d at 1158 & n.2; *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007). Those cases, like this one, applied the *Randolph* framework.

Kristian and *Cotton Yarn* were decided prior to *Concepcion*, and both involved federal antitrust claims. The *Kristian* plaintiffs submitted uncontested expert affidavits demonstrating that they would each have to spend "a minimum of $300,000" on an antitrust market study to prevail in arbitration. 446 F.3d at 58. Because there was "no doubt" that "these large arbitration costs" would preclude the effective vindication of federal rights, the First Circuit held that the plaintiffs had satisfied their heavy burden under *Randolph*. *Id.* at 54-59. By contrast, the *Cotton Yarn* plaintiffs "developed no evidentiary record ... establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration." 505 F.3d at 285. "This kind of uninformed speculation about cost," the Fourth Circuit held, "falls far short of satisfying the plaintiffs' burden" under *Randolph*. *Id.* These outcomes, although different on their facts, are identical on the law. They reveal the consistency with which *Randolph* has been applied.

This consistency has continued since *Concepcion*. In *Coneff*, the Ninth Circuit agreed with the decision below that *Concepcion* is not "inconsistent with *Green Tree* [*v. Randolph*] and similar cases." *Id.* at 1158. But it rejected the plaintiffs' arguments on the merits because (1) they "assert[ed] primarily state statutory rights" and (2) their "federal claim fail[ed] under [*Randolph*]." *Id.* at 1158 n.2. On this second point, the *Coneff* plaintiffs could not show that they had "no effective *means* to vindicate their rights" in arbitration, but only that arbitration diminished their "*incentive* to do so." *Id.* at 1159. "It is on this reasoning" that the Ninth Circuit expressly "distinguish[ed]" the decision below. *Id.* at 1159 n.3. Thus, the Ninth Circuit agreed with the Second Circuit's reasoning, but reached the opposite result because the plaintiffs there failed to satisfy the necessary elements of the *Randolph* test.[7]

The *Coneff* plaintiffs could not argue that they had no effective *means* to vindicate their rights in arbitration because of the particular features of AT&T's consumer-friendly arbitration clause, the same one considered by this Court in *Concepcion*. Under that clause, those who file a claim are "essentially guaranteed to be made whole." *Concepcion*, 131 S. Ct. at 1753 (brackets and internal quotation marks omitted). The eight-year-old ar-

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[7] Petitioners' attempt to concoct a circuit split ignores *Coneff*'s core reasoning and relies instead on a misreading of a single sentence of dictum. In a footnote, after agreeing that *Randolph* survives *Concepcion* and then distinguishing the decision below on its facts, the Ninth Circuit unremarkably went on to state: "To the extent that the Second Circuit's opinion is not distinguishable, we disagree with it." *Id.* But the decision below, of course, *is* distinguishable—and for the very reasons the Ninth Circuit identified in the body of its opinion.

bitration clause at issue in this case, on the other hand, contains no such guarantee. Just the opposite: Given the high non-recoverable costs of conducting a market study, and the lack of any cost-shifting or cost-spreading mechanism, the clause guarantees that respondents will *not* be made whole.

Nor does the decision below conflict with *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). Like the Ninth Circuit in *Coneff*, the Third Circuit in *Johnson* held that the plaintiffs failed to meet their heavy burden of proving that their federal statutory rights could not be effectively vindicated in arbitration. 225 F.3d at 369 ("That burden has not been met here."). The *Johnson* plaintiff never argued, however, that arbitration would "eliminate" the only economically feasible means of vindicating his statutory rights, but instead generally asserted only that arbitration is "less attractive than pursuing a class action in the courts." *Id.* at 374. That is not nearly enough, and it would not be nearly enough under the Second Circuit's rigorous application of *Randolph* below.

The Fifth Circuit's decision in *Carter v. Countrywide Credit Industry, Inc.*, also poses no conflict because there too the plaintiffs failed to meet their burden of proof and their only properly argued effective-vindication claim was moot. 362 F.3d 294, 298-300 (5th Cir. 2004). *Carter* first rejected the plaintiffs' unsupported arguments that arbitration would "interfere with their right under the [Fair Labor Standards Act] to proceed collectively." *Id.* at 298-99. Then, the court held that the defendants had mooted the plaintiffs' prohibitive-

costs argument under *Randolph* by agreeing to "pay all arbitration costs." *Id.* at 300.[8]

Far from creating a circuit split, the decision below in fact avoids one. It applies the same test as every other decision in every other regional circuit, before and after *Concepcion*. And it reaches the same holding as the most closely analogous case, in which the plaintiffs conclusively demonstrated that they could not vindicate their federal statutory rights in the arbitral forum. *See Kristian*, 446 F.3d at 54-59. There is no conflict for this Court to resolve.

III. Petitioners' Speculation Is Unfounded and Review Now Is Unwarranted.

As explained, the decision below is a case-specific application of this Court's settled doctrine and is fully consistent with other circuits' similarly fact-bound decisions. It is no sinister evasion of *Concepcion*. Nor is there any reason to believe it will be applied as such. If later applications prove otherwise, those future cases can be reviewed at that future time, with the benefit of a full Court. *See Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (reflecting Justice Sotomayor's recusal); *see also Laird v. Tatum*, 409 U.S. 824, 837-38 (1972) (memorandum of Rehnquist, J.) (discussing the "undesirability" of "the disqualification of one Justice of this Court" resulting in "an affirmance of the judgment

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[8] Looking further afield, the Chamber (at 14) cites two other cases in an effort to conjure a split. But *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011), involved only *state-law* claims and reaffirmed the effective-vindication doctrine's application to *federal* claims. And *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234-35 (11th Cir. 2012), likewise involved only *state-law* claims.

below by an equally divided Court"). For now, the prudent course is to refrain from premature review.

The decision below does not affect the mine run of federal statutory cases where consumers and employees can effectively prosecute their claims through arbitration. The Second Circuit made clear that the evidentiary record necessary to invalidate an arbitration clause under *Randolph* "is not easily assembled," and that "courts are capable of the scrutiny such arguments require." Pet. App. 25. In fact, in the 12 years since *Randolph*, only two appellate decisions, including the decision below, have held that arbitration does not allow for the effective vindication of federal statutory rights because of the inability of claimants to share costs in aggregated proceedings. And both cases involved complex and hugely expensive antitrust actions, where the amount of non-recoupable costs dwarfed the expected individual recoveries. *See Kristian*, 446 F.3d 25; Pet. App. 25. If *Randolph* continues to be applied as faithfully and narrowly as it has been thus far, there will be no need for this Court's intervention.

If the well-established *Randolph* rule were likely to open the floodgates to class actions, one would expect to see some evidence of this from before *Concepcion*, particularly in states that did not adopt unconscionability rules like California's. Yet the petition offers no such evidence, and there is none. *Kristian* (decided in 2006) and the decision below are the only cases of their kind. Where petitioners fear a flood, the empirical evidence shows barely a trickle.

Petitioners point to a single district court case as proof that the decision below will lead to widespread arbitration avoidance. That case, *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528 (S.D.N.Y. 2012), is fully

briefed on appeal in the Second Circuit and has generated amicus briefs on both sides, including one filed by the United States. *Sutherland v. Ernst & Young LLP*, 2d Cir. Case No. 12-304. *Compare* Appellants' Br. 2-3 (arguing that the decision below is "not a per se rule," but requires "a detailed showing of prohibitive costs that 'is not easily assembled'" and is not met when the costs are recoupable), *with* U.S. Dep't of Labor Br. 8 (supporting the appellee and arguing that the decision below should apply when the plaintiff can show prohibitive costs, even if recoupable, because "plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of the suit's potential costs"). *Sutherland* provides the Second Circuit with an excellent opportunity to flesh out the contours of the decision below. Whatever the outcome, that percolation would be beneficial.[9]

Developments in the drafting and enforcement of arbitration clauses further counsel against premature intervention by this Court. "Consumer-friendly" arbitration clauses—like the AT&T clause at issue in *Concepcion* and *Coneff*—are becoming increasingly widespread. A recent empirical study of "37 current arbitration clauses" "confirm[s] that many large and well-known consumer-oriented companies have indeed added 'friendly' provisions to their arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising 'bounty' or premium pay-

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[9] The Chamber (at 9 n.7) also points to another case, which is also now pending before the Second Circuit. That case concerns a different issue: whether Title VII pattern-or-practice claims—which cannot be prosecuted individually—may be sent to arbitration. *See Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011), 2d Cir. Case No. 11-5229.

ments to claimants who achieve a better outcome in arbitration than the company's last-best offer." Myriam E. Gilles, *Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, Notre Dame L. Rev. (forthcoming 2013).[10]

For example, Microsoft very recently added an arbitration clause to its services agreement that includes many of the pro-consumer provisions included in AT&T's clause, but with an additional promise to "reimburse any expenses (including expert witness fees and costs)" incurred in pursuing a claim that results in an award that is greater than Microsoft's last written offer.[11] And Groupon's clause was amended in late 2011 to provide that "in the event that [the claimant is] able to demonstrate that the costs of arbitration will be prohibitive as compared to the costs of litigation, Groupon will pay as much of your filing and hearing fees in connection with the arbitration as the arbitrator deems necessary to *prevent the arbitration from being cost-prohibitive*." (Emphasis added.)[12] This case, by contrast, includes an eight-year-old arbitration agreement that is completely lacking in such features. In light of the ongoing trend toward arbitration clauses including "alternative incentives," the "specific facts" presented by this case are "unlikely to be repeated." Jacob Spencer, *Arbitration, Class Waivers,*

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[10] The study is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132604.

[11] The agreement is available at http://windows.microsoft.com/en-US/windows-live/microsoft-services-agreement.

[12] The agreement is available at http://www.groupon.com/terms#arbitration.

and Statutory Rights, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (2012).

The Court should allow this evolutionary process to continue, just as it did prior to *Concepcion*.[13] By refraining from premature intervention—as AT&T's amicus brief pointed out before *Concepcion*—this Court allowed for "the continued evolution of both arbitration clauses" in the marketplace and "the law governing their enforceability." Amicus Br. of AT&T Moblility, 2008 WL 534808, at *5 (filed Feb. 25, 2008), in *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (No. 07-976) (urging the denial of certiorari to allow for percolation and development of consumer-friendly clauses such as AT&T's). Given the absence of any conflict on the question presented, the Court should do the same here.

If lower courts continue applying the *Randolph* framework narrowly and companies continue adopting claimant-friendly arbitration clauses, no action by this Court will be needed. If a different course of events unfolds, this Court will have ample opportunity to address the question, with the benefit of those future developments. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari) ("Wise adjudication has its own time

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[13] Before *Concepcion*, the Court repeatedly denied certiorari in cases involving earlier, less-claimant-friendly clauses. *See, e.g. Athens Disposal Co. v. Franco*, 130 S. Ct. 1050 (2010); *T-Mobile USA v. Laster*, 128 S. Ct. 2500 (2008); *T-Mobile USA v. Janda*, 129 S. Ct. 45 (2008); *T-Mobile USA v. Lowden*, 129 S. Ct. 45 (2008); *T-Mobile USA v. Ford*, 128 S. Ct. 2503 (2008); *T-Mobile USA v. Gatton*, 128 S. Ct. 2501 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008); and *Cnty. Bank v. Muhammad*, 127 S. Ct. 2032 (2007).

for ripening."). Intervention now is both unnecessary and unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

RECORD
AND
BRIEFS

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Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioners American Express Company's and American Express Travel Related Services Company, Inc.'s Rule 29.6 Statement was set forth at p. iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The panel below invalidated the parties' arbitration agreement solely because of its class-action waiver provision: "[A]s the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable." App. 28a. As the Ninth Circuit recognized in *Coneff*, the panel's holding is foreclosed by *Concepcion*, which held that "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" violates the FAA. 131 S. Ct. at 1744, 1748. Certiorari is warranted to prevent a two-judge Second Circuit panel from effectively gutting *Concepcion* in cases involving federal claims and to resolve this circuit split.

Respondents contend (at 2) that the decision below merely constitutes "fact-bound application" of an "effective-vindication doctrine" supposedly long established by this Court. Respondents' arguments bolster the case for certiorari, because they demonstrate the urgent need for this Court to clarify its "effective-vindication" *dictum* in light of "misleading" lower court efforts to "distort[]" it into a broad license to evade the FAA's mandate that arbitration agreements be enforced according to their terms. App. 141a, 143a, 145a (Jacobs, C.J., dissenting from denial of reh'g in banc).

This Court should not postpone review. The decision below is not limited to "truly rare" cases. Opp. 2. It provides an easy-to-follow roadmap for plaintiff's lawyers to invalidate literally millions of arbitration agreements nationwide. Nor will further percolation assist the Court in deciding whether that result is faithful to its own precedents. The issues presented are "indisputably important" and call for this Court's prompt review. App. 148a (Cabranes, J., dissenting from denial of reh'g in banc).

ARGUMENT

I. CERTIORARI IS WARRANTED TO VINDICATE THIS COURT'S FAA PRECEDENTS

A. The Decision Below Threatens To Negate *Concepcion* in a Broad Swath of Cases

Concepcion held that "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" is impermissible under the FAA. 131 S. Ct. at 1744. Astonishingly, respondents deny that the panel imposed such a condition, asserting that its holding is not "about class arbitration" at all. Opp. 17-18. That is a brazen mischaracterization.

Amex III found the parties' arbitration agreement "unenforceable" solely because "the class action waiver in this case precludes plaintiffs from enforcing their statutory rights." App. 28a. It did not merely insist on "*some* means of vindicating their federal statutory rights," including "the pro-claimant features provided in more recently drafted arbitration agreements." Opp. 18. All three panel opinions focused exclusively on the class-action waiver; none even mentions other "pro-claimant" cost-shifting features. Indeed, respondents did not challenge any other provision of the agreement. *See* App. 3a (stating that "the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced"); *see also* App. 8a-9a; App. 111a.

Had the parties' arbitration agreement provided for class arbitration, the panel would have enforced it. The panel made that clear in *Amex I* and then

reaffirmed it in *Amex II* and *Amex III*.[1] That condition is exactly what *Concepcion* forbids. Class arbitration is "not arbitration as envisioned by the FAA." 131 S. Ct. at 1753. Conditioning the enforcement of arbitration agreements on the availability of class arbitration violates the FAA because it allows parties "to demand it *ex post*." *Id.* at 1750.

Respondents also defend the panel's effort to limit *Concepcion* to state-law claims. Opp. 17. But, like the panel, respondents cannot point to anything in *Concepcion* supporting such a limitation. That is unsurprising, given this Court's longstanding holding that the FAA applies equally to federal statutory claims. *See Mitsubishi*, 473 U.S. at 627-28; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 485 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)). Federal- and state-law claims differ only in that Congress can, if it chooses, override the FAA's mandate for particular federal claims. *See* Pet. 16-17. But Congress indisputably has not done so for federal antitrust claims. *See* Pet. 17.

Under *Amex III*, a plaintiff need only manufacture a federal statutory claim to evade *Concepcion*. That is not a difficult task for any plaintiff's lawyer, and it is already happening. *See* Chamber of Commerce *et al. Amicus* Br. 8 n.6 ("Chamber Br."). Certiorari is

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[1] In an effort to obscure the panel's insistence on class arbitration, respondents mischaracterize *Amex I* as having "held that *the arbitration clause* could not 'be enforced in this case.'" Opp. 7 (quoting *Amex I*) (emphasis added). In fact, *Amex I* "h[e]ld that the *class action waiver in the Card Acceptance Agreement* cannot be enforced in this case." App. 95a (emphasis added). *Amex II* and *Amex III* also invalidated the class-action waiver and then concluded that *Stolt-Nielsen* required nullification of the *entire* arbitration agreement as the remedy. App. 28a-30a, 54a-56a.

warranted to prevent the decision below from nullifying *Concepcion* in a broad swath of cases.

B. This Court Should Grant Certiorari To Prevent Its "Effective-Vindication" *Dicta* from Being Distorted To Evade *Concepcion*

Respondents contend (at 11-16) that the "effective-vindication principle" supposedly endorsed by this Court in *Mitsubishi* and *Randolph* authorizes federal courts to condition enforcement of arbitration agreements on class arbitration. If that interpretation of *Mitsubishi* and *Randolph* were correct, it would put those cases at odds with *Concepcion*, which rejected the very same "effective-vindication" argument. *See* 131 S. Ct. at 1753 (rejecting dissent's contention that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"). Indeed, *Amex III* acknowledged the need for this Court's clarification of its own precedents, saying it was "leaving to this Court the prerogative of overruling its own decisions." App. 25a (internal quotations omitted). While no overruling is required, this Court should certainly act to eliminate the confusion that has arisen in the lower courts by clarifying that its prior *dicta* do not override *Concepcion* for federal-law claims.

Certiorari is warranted, moreover, because the panel's interpretation of *Mitsubishi* and *Randolph* is untenable and impermissibly imposes special burdens on arbitration. *Mitsubishi*'s "effective-vindication" comment addressed concerns that the arbitrators would refuse to apply *substantive* American antitrust law. 473 U.S. at 636-37 & n.19; *see* Pet. 21. The same is true of *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995) (discussing substantive choice-of-law provisions), and

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009) (discussing a "substantive waiver of federally protected civil rights").[2] It is thus "misleading" to read into these decisions a license for courts to invalidate arbitration agreements whenever they perceive the parties' agreed-upon arbitration *procedures* as ineffective in vindicating federal statutory claims. App. 143a (Jacobs, C.J.).

Mitsubishi also provides a full response to respondents' policy arguments. Unless Congress prescribes special rules, enforcement of the parties' agreement "harmonizes the FAA's general policy in favor of arbitration with the specific federal statutory protections." Opp. 12. The FAA protects the "integrity" of the arbitral process by giving effect to the parties' agreement and prohibiting courts from substituting their views of what procedures are "effective." Opp. 16.

Respondents likewise misconstrue *Randolph*. They do not dispute, nor did the panel, that *Randolph*, by its terms, referred only to "large *arbitration* costs" that would not be required to litigate in court. 531 U.S. at 90 (emphasis added); *see* Pet. 18-19; App. 22a.[3] Yet respondents assert (at 15) that *Randolph* guarantees every plaintiff in arbitration will be spared *any* costs (including those they would equally incur in litigation) that exceed their likely recovery. That cannot be correct, given that plaintiffs in court have no similar guarantee. Indeed, Rule 23's strictures

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[2] *See also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.) (invalidating arbitration agreement under *Mitsubishi* because it eliminated a *substantive* federal remedy – namely, punitive damages).

[3] Respondents (at 13) deny that *Randolph*'s statement was *dicta*, but even the panel acknowledged as much. App. 22a.

are not excused even if applying them will prevent a plaintiff from spreading "prohibitive" litigation costs. *Amex III*'s "distortion" of *Randolph* (App. 143a (Jacobs, C.J.)) impermissibly imposes a special burden on arbitration, which is precisely what the FAA forbids. *See Concepcion*, 131 S. Ct. at 1747-48.

Contrary to respondents' mischaracterization (at 9), "[e]very circuit court" has not followed respondents' reading of *Randolph*. Except for the First Circuit in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), all of respondents' cases (at 13 n.6) applied *Randolph* to "cost-splitting," "fee-sharing," and other provisions requiring the plaintiff to pay all or part of the costs *of the arbitral forum*.[4] Likewise, *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 12-13 (1st Cir. 2009), addressed the possibility that the "costs of arbitration itself" would "*prevent* a litigant from having access to the arbitrator."[5]

Finally, respondents assert that the parties' arbitration agreement imposes costs that "*are* unique

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[4] *See Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 216-17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 553-54 (4th Cir. 2001); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 657-59 (6th Cir. 2003) (en banc); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 566-67 (8th Cir. 2007); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 779-80 (10th Cir. 2010); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258-59 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001). *Coneff* is inapposite for the reasons given below. *See infra* pp. 7-8.

[5] Although *Awuah* said arbitrators' fees were "not necessarily the only" type of arbitration-specific costs, it nowhere endorsed considering costs that would be incurred in litigation. 554 F.3d at 12.

to arbitration." Opp. 14. That is just wordplay. Respondents faced the same antitrust expert costs whether in "arbitration or litigation." App. 26a. Their complaint is that class arbitration is unavailable to spread those costs. Opp. 14, 19. But clearly *Randolph* never addressed that issue: it declined to consider plaintiffs' challenge to the bar on class arbitration. 531 U.S. at 92 n.7. *Concepcion*, by contrast, squarely rejected the possibility of "prohibitive costs" as a justification for insisting on class arbitration. *See Concepcion*, 131 S. Ct. at 1753 (rejecting the same justification offered by the dissent); *Coneff*, 673 F.3d at 1159 (*Concepcion* "more directly and more recently addresses the issue . . . in this case"). This Court's intervention is necessary to prevent its "effective-vindication" *dicta* from being distorted to nullify *Concepcion* in cases asserting federal claims.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT DESERVING THIS COURT'S PROMPT REVIEW

Respondents' denial of a circuit split strains credibility. According to respondents: "Far from disagreeing with the decision below, *Coneff* distinguished it on its facts." Opp. 2. Respondents even say that *Coneff* "agreed with the Second Circuit's reasoning" in *Amex III*. Opp. 20. But *Coneff* was clear: "To the extent that the Second Circuit's opinion is not distinguishable, *we disagree with it*." 673 F.3d at 1159 n.3 (emphasis added). *Coneff* creates a square split with *Amex III* because it rejected an "effective-vindication" challenge to a class-action waiver in the context of a federal claim. *See id.* at 1157-58 & n.2.

All three opinions dissenting from denial of rehearing en banc recognized a conflict between the two cases. *See* Pet. 22. Moreover, district courts in the

Ninth Circuit have refused to follow the Second Circuit's "effective-vindication" rule because *Coneff* rejected it. *See* Pet. 23-24. By contrast, district courts in the Second Circuit have repeatedly held that they are bound to follow *Amex III*.[6] This Court's review thus is warranted because the decision below creates disuniformity between two of the most prominent and populous federal circuits on an important question of federal arbitration law.

Respondents' effort to distinguish *Coneff* rests on the same type of "labored" analysis the panel used in trying to distinguish *Concepcion*. App. 143a (Jacobs, C.J.). *Amex III* itself undermines respondents' proffered distinction (Opp. 20) between "means" and "incentives," because the panel held it inadequate under *Randolph* for the arbitration agreement merely to make plaintiffs whole; it must also give them incentives to sue by compensating them for the "risk of losing." App. 27a (internal quotations omitted); *see* Pet. 24 n.15.

Respondents also deny that the decision below conflicts with the Third Circuit's decision in *Johnson* or the Fifth Circuit's decision in *Carter*, even though the panel expressly disagreed with those cases, *see* App. 46a-47a. Respondents distort *Johnson* and *Carter*, just as they do *Mitsubishi* and *Randolph*. *Johnson* did not merely find the plaintiffs' evidence insufficient under *Randolph*. *Johnson* categorically "rejected the premise that . . . a class-action waiver is unenforceable because it effectively prevents plaintiffs from

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[6] *See Orman v. Citigroup, Inc.*, No. 11-cv-7086, 2012 WL 4039850, at *3 (S.D.N.Y. Sept. 12, 2012); *Fromer v. Comcast Corp.*, No. 09-cv-2076, 2012 WL 3600298, at *4 (D. Conn. Aug. 21, 2012); *In re Electronic Books Antitrust Litig.*, No. 11-MD-2293, 2012 WL 2478462, at *2-*3 (S.D.N.Y. June 27, 2012).

bringing a federal statutory claim at all." *Brokers' Servs. Mktg. Group v. Cellco P'ship*, Civil Action No. 10-3973 (JAP), 2012 WL 1048423, at *4-*5 (D.N.J. Mar. 28, 2012) (citing *Johnson*, 225 F.3d at 369).

Likewise, *Carter* did not find that plaintiffs lacked adequate proof of "prohibitive costs" under *Randolph*. Opp. 21. *Carter* never embraced *Randolph*'s "prohibitive costs" *dicta* as a basis to invalidate a class-action waiver. Rather, it held based on *Gilmer* that, "[s]o long as a plaintiff can pursue the substantive statutory rights through *individual* arbitration, a plaintiff's inability to proceed collectively or on behalf of a class is legally irrelevant." *Veliz v. Cintas Corp.*, No. 03-01180, 2005 WL 1048699, at *3 (N.D. Cal. May 4, 2005) (citing *Carter*, 362 F.3d at 298). That is why the panel here explicitly "rejected the reasoning relied on in" *Carter*. *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011); *see* App. 47a.

Notwithstanding respondents' claims to the contrary, the Third, Fifth, and Ninth Circuits would have enforced the parties' arbitration agreement here. Every other circuit except the First Circuit likely would have done so too. *See supra* note 4. *Amex III* clearly creates a circuit split warranting this Court's review.

III. THIS COURT SHOULD NOT DELAY REVIEW

This Court's immediate review is needed because *Amex III* will lead to the invalidation of innumerable arbitration agreements nationwide. Respondents' assertion (at 2) that *Amex III* is limited to "truly rare" cases is not credible. The panel's reasoning abrogates arbitration for all but the largest individual antitrust claims with damages greater than $1

million. These sweeping effects will not be limited to complex antitrust cases, because many federal claims are costly to litigate. And the decision below will become a *de facto* nationwide rule, given the ease with which companies can be sued in the Second Circuit. *See* Pet. 30-31. As a matter of common sense, *Amex III* will undermine arbitration agreements – and require class actions to proceed in court – for a large number of consumer and other relatively modest-value claims. *See* App. 137a (Jacobs, C.J.).

Respondents (at 23) tout *Amex III*'s supposedly stringent evidentiary standard, but this case shows it has no teeth. All it took was a single affidavit by a paid consultant, "uncritically" adopted by the panel, to invalidate the parties' agreement. App. 137a (Jacobs, C.J.). This is no tall order, and plaintiff groups are already preparing "model" affidavits that can be used to surmount this low bar. Chamber Br. 11.

The fact that only two circuit cases have actually invalidated a class-action waiver under the "effective-vindication" principle does not indicate that the decision below is narrow. Opp. 23. To the contrary, those two cases are the only ones to have interpreted *Randolph* to permit class-arbitration waivers to be invalidated based on "prohibitive costs." Pre-*Concepcion* experience confirms that, once this erroneous principle is adopted, class-action waivers will be routinely invalidated. *See Concepcion*, 131 S. Ct. at 1746 (noting that California courts "frequently applied" the analogous, but narrower, *Discover Bank* rule to invalidate arbitration agreements).

Moreover, even a searching "prohibitive" costs inquiry would jeopardize arbitration's core purpose, by subjecting parties to costly, protracted litigation just to determine arbitrability. As a result, parties

likely would be forced to "spen[d] many times the cost of an arbitral proceeding just enforcing the arbitration clause." App. 139a (Jacobs, C.J.). Respondents provide no answer to this important reason for this Court's review.

Further percolation will not assist the Court in interpreting its own FAA decisions. The opposing arguments have been thoroughly vetted by the appellate courts, including in three panel opinions and three separate dissents from *en banc* review in this case alone. There is no reason to await the Second Circuit's decision in *Sutherland v. Ernst & Young LLP*, No. 12-304 (2d Cir.). The full Second Circuit has already passed up the opportunity "to flesh out the contours of the decision below," Opp. 24, instead indicating that the issue should be resolved by this Court. *See* App. 148a (Cabranes, J.) ("This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.").

Respondents' suggestion (at 22) that certiorari would be imprudent because of Justice Sotomayor's recusal is inconsistent with this Court's established practice. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (Sotomayor, J., recused); *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010) (same).

Finally, any trend toward "consumer-friendly" cost-shifting provisions (Opp. 24) is irrelevant to the issues here. The panel did not mention such provisions, much less consider them pertinent. *See supra* p. 2. It focused exclusively on the agreement's class-action waiver – a provision that is "common[]" in commercial arbitration agreements. App. 135a

(Jacobs, C.J.). Because *Amex III* authorizes routine invalidation of such agreements – in contravention of the FAA and *Concepcion* – this Court should accept the Second Circuit dissenters' call for prompt review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

AUG 2 2012

No. 12-133

In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and pay $163 billion in dividends to shareholders.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. ABA members hold an overwhelming majority—approximately 95

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief, and their letters consenting to the filing of the brief have been filed with the Clerk.

percent—of the domestic assets of the U.S. banking industry.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Relying on the Federal Arbitration Act's policies promoting arbitration and this Court's consistent vindication of those policies over the past half-century, many of *amici*'s members use arbitration agreements in millions of their contractual relationships. By eliminating the huge litigation costs associated with resolving disputes in court, those agreements create cost savings that result in lower prices for consumers, higher wages for employees, and benefits for the entire national economy.

Most arbitration agreements require that disputes be resolved on an individual, rather than class-wide, basis. As this Court explained in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), class procedures interfere with the simplicity, informality, and expedition that are characteristic of arbitration.

The Second Circuit in this case refused to enforce the parties' agreements to arbitrate on an individual basis, instead holding that plaintiffs' federal anti-

trust claims must proceed as a putative class action. Because the advantages of arbitration would be lost if the Second Circuit's ruling stands, *amici* have an extremely strong interest in this case.

SUMMARY OF ARGUMENT

A two-judge panel of the Second Circuit refused to enforce the parties' agreements to arbitrate their disputes on an individual basis because the court determined—on the basis of a single affidavit from an expert witness retained by plaintiffs' counsel—that "the practical effect of enforcement would be to preclude [plaintiffs'] ability to vindicate their federal statutory rights." Pet. App. 15a.

The panel did not dispute that if the plaintiffs here had asserted state-law claims, this Court's decision in *Concepcion* would control—and the arbitration agreements would be enforced. It nonetheless determined that when a plaintiff's claim arises under federal law, a court must refuse to enforce the arbitration agreement if the court concludes, based on a case-by-case factual assessment, that it would be "economically [in]feasible" for the plaintiff to vindicate his federal rights in an individual arbitration.

This Court's review is urgently needed for two fundamental reasons.

First, the decision below is the product of an intense effort by the plaintiffs' bar to undermine this Court's decision in *Concepcion* and, if permitted to stand, it threatens to do just that. Virtually any class-action complaint can be framed to include at least one federal claim. And plaintiffs' lawyers can readily retain an expert to assert that the costs of proving a plaintiff's claim would outweigh the potential recovery—thereby providing the factual predi-

cate needed to avoid arbitration on an individual basis under the Second Circuit's approach.

As a result, the vast majority of businesses sued in a putative class action in the Second Circuit will either be deprived of their arbitration rights altogether or permitted to invoke them only after costly and time-consuming litigation regarding projected costs of proving the claim in arbitration. Because forum-shopping plaintiffs can bring virtually any class action in the Second Circuit—and almost every business of any significant size is susceptible to suit in New York—the decision below will effectively apply nationwide, calling into question literally millions of arbitration agreements.

Second, the Second Circuit panel patently misread *Concepcion*. This Court's preemption holding rested on its construction of the FAA—the conclusion that the statute protects the right to arbitrate on an individual basis—and that construction applies equally to claims arising under federal law. Nothing in the FAA indicates that the statute subjects arbitrable state-law claims to a standard different than arbitrable federal-law claims.

To be sure, Congress may exclude federal claims from the otherwise-applicable arbitrability principle embodied in the FAA. But the standard for demonstrating exclusion of a claim from the FAA is demanding, and this Court has already held that antitrust claims are not subject to such an exclusion.

And, although this Court has indicated that an arbitration agreement may not be enforced when *costs unique to the arbitration process* effectively preclude the plaintiff from initiating arbitration, that principle does not grant courts a roving commission

to invalidate arbitration clauses based on the supposed costs of proving the plaintiff's claim. It applies only to the costs of accessing the arbitral forum.

Finally, although policy concerns are irrelevant to the legal question presented here, the policy rationale underlying the Second Circuit's decision is wrong as well. The panel assumed that individual arbitration would proceed in exactly the same way as a class action in court, ignoring this Court's repeated recognition that arbitration is simpler, quicker, and less formal than litigation in court. And the panel's case-specific assessment ignores the fact that arbitration clauses apply to a range of disputes—and, because of arbitration's greater efficiency, provide aggrieved parties with the ability to pursue claims that could not be pursued economically in court. Determining that an arbitration clause is impermissible based on how it applies to one type of claim simply makes no sense.

ARGUMENT

I. THE IMPORTANCE OF THE ISSUE PRESENTED NECESSITATES THIS COURT'S IMMEDIATE REVIEW.

The decision below provides plaintiffs with a forum and roadmap for judicial invalidation of millions of arbitration agreements in direct contravention of this Court's decision in *Concepcion*—a result that will undermine substantially the strong federal policy favoring arbitration.

A. The Plaintiffs' Bar Has Aggressively Promoted Contrived Limitations On This Court's Ruling In *Concepcion*.

This Court held in *Concepcion* that "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with "arbitration as envisioned by the FAA." 131 S. Ct. at 1744, 1753. It therefore determined that California's state-law rule requiring class procedures was preempted by the FAA.

Concepcion vindicates the "federal policy favoring arbitration" embodied in the FAA, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and the benefits that parties to arbitration agreements receive from less costly and more efficient dispute resolution.[2]

But the Court's holding threatens the one group that benefits from the high transaction costs of litigation—class-action lawyers. It therefore is not surprising that the Court's decision triggered an intensive effort by the plaintiffs' bar to promote contrived limitations on *Concepcion*.

Immediately following the Court's ruling, many plaintiffs argued that *Concepcion* is limited to its facts—either arbitration clauses with the exact same language and features or the specific California un-

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[2] The lower cost of dispute resolution also reduces the costs of doing business, allowing for lower prices for consumers and higher wages for employees. See, *e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91; Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5-7 (1995).

conscionability rule addressed in that decision. Lower courts rejected those arguments.[3]

Plaintiffs' lawyers around the country also argued that courts remained free to refuse to enforce arbitration agreements when the lack of class procedures allegedly prevents them from "effectively vindicating" their state-law claims. Again, those arguments were rejected by virtually every lower court.[4]

Unable to convince the lower courts to adopt unjustified limitations on *Concepcion* when claims arise under state law, those seeking to invalidate arbitration agreements suggested arguing that courts must conduct a case-specific factual inquiry to assess whether plaintiffs need class procedures to "effectively vindicate" their *federal* statutory rights, and invalidate agreements to arbitrate solely because they preclude class arbitration—the precise result that *Concepcion* forbids.[5]

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[3] See, *e.g.*, *Morvant* v. *P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at *7-*8 (N.D. Cal. May 7, 2012); *Lewis* v. *UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161, 1167 (N.D. Cal. 2011).

[4] See, *e.g.*, *Homa* v. *Am. Express Co.*, 2012 WL 3594231 (3d Cir. Aug. 22, 2012); *Pendergast* v. *Sprint Nextel Corp.*, 2012 WL 3553466 (11th Cir. Aug. 20, 2012); *Coneff* v. *AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012); *Cruz* v. *Cingular Wireless LLC*, 648 F.3d 1205 (11th Cir. 2011); *Kaltwasser* v. *AT&T Mobility LLC*, 812 F. Supp. 2d 1042 (N.D. Cal. 2011).

[5] See, *e.g.*, Leslie Bailey & Paul Bland, *How courts can and should limit AT&T Mobility LLC* v. *Concepcion*, Public Justice, http://publicjustice.net/ConcepcionMemo (visited Aug. 27, 2012); Myriam Gilles, AT&T Mobility vs. Concepcion: *From Unconscionability to Vindication of Rights*, Scotusblog (Sept. 15, 2011), http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights/.

This argument has been advanced in numerous courts around the country.[6] Although virtually all courts outside the Second Circuit have rejected it, the Second Circuit's acceptance of this theory threatens to open a vast loophole for plaintiffs seeking to avoid enforcement of agreements to arbitrate on an individual basis.

B. The Second Circuit's "Vindication-Of-Federal-Statutory-Rights" Test Threatens To Limit *Concepcion* Drastically.

The Second Circuit panel held that an agreement to arbitrate on an individual basis is invalid whenever "the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." Pet. App. 15a. According to the panel, this factual showing is case-specific—the enforceability of an arbitration agreement "must be considered on its

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[6] See, *e.g.*, *Fromer* v. *Comcast Corp.*, 2012 WL 3600298, at *6 (D. Conn. Aug. 21, 2012); *Rame, LLC* v. *Popovich*, 2012 WL 2719159, at *12 (S.D.N.Y. July 9, 2012); *In re Elec. Books Antitrust Litig.*, 2012 WL 2478462, at *2 (S.D.N.Y. June 27, 2012); *Knutson* v. *Sirius XM Radio Inc.*, 2012 WL 1965337, at *5 (S.D. Cal. May 31, 2012); *Coleman* v. *Jenny Craig, Inc.*, 2012 WL 3140299, at *4 (S.D. Cal. May 15, 2012); *Karp* v. *CIGNA Healthcare, Inc.*, 2012 WL 1358652, at *5-*10 (D. Mass. Apr. 18, 2012); *Emilio* v. *Sprint Spectrum L.P.*, 2012 WL 917535, at *4 (S.D.N.Y. Mar. 16, 2012); *LaVoice* v. *UBS Fin. Servs., Inc.*, 2012 WL 124590, at *7-*8 (S.D.N.Y. Jan. 13, 2012); *Sutherland* v. *Ernst & Young LLP*, 847 F. Supp. 2d 528, 535-538 (S.D.N.Y. 2012); *In re Apple & AT&TM iPhone Antitrust Litig.*, 826 F. Supp. 2d 1168, 1175 (N.D. Cal. Dec. 1, 2011); *Raniere* v. *Citigroup Inc.*, 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011); *Adams* v. *AT&T Mobility LLC*, 816 F. Supp. 2d 1077, 1091-1092 (W.D. Wash. 2011); *Chen-Oster* v. *Goldman, Sachs & Co.*, 2011 WL 2671813, at *4 (S.D.N.Y. July 7, 2011).

own merits, based on its own record." *Id.* at 29a. Here, relying on the affidavit of a single paid expert witness, the panel concluded that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id.* at 27a.[7]

This "vindication-of-statutory-rights" theory is, of course, the precise argument that the Court expressly rejected in *Concepcion*—holding irrelevant (because "States cannot require a procedure that is inconsistent with the FAA") the dissent's "claim[] that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753.

The practical effect of the Second Circuit's ruling is to enable the vast majority of class-action plaintiffs to avoid *Concepcion* by bringing suit there, filing an affidavit from a paid expert stating that it is impractical to litigate the claim in an individual arbitration, and obtaining the invalidation of the arbitration agreement based on the "case-by-case" test endorsed by the panel below. Even when the party seeking to enforce an arbitration agreement prevails, it will have been forced to undergo burdensome satellite litigation regarding the plaintiffs' alleged ability to vindicate their claims in arbitration. Both of these results directly contravene the FAA.

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[7] Although the panel issued its ruling in an antitrust case, the decision is already being applied to claims under other federal statutes. See, *e.g.*, *Sutherland*, *supra* (Fair Labor Standards Act); *Chen-Oster*, *supra* (Title VII of the Civil Rights Act).

1. The "vindication" test will allow the vast majority of class-action plaintiffs to improperly resist a motion to compel arbitration.

The panel below held that a single expert witness's assertion that it would cost "'from about $300 thousand to more than $2 million'" to arbitrate each class member's claim—consisting in large measure of that expert's own witness fees—"establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Pet. App. 14a, 26a.

Chief Judge Jacobs recognized in his dissent from the denial of rehearing en banc that the panel's "broad ruling" could "be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver." *Id.* at 137a. Plaintiffs' lawyers need only include a federal claim in the complaint and retain a paid expert to testify that the cost of pursing an individual claim would be prohibitive. As Chief Judge Jacobs observed, "there is no shortage" of "consultant[s]" willing "to opine that expert costs would outweigh a plaintiff's individual loss." *Ibid.*[8]

That is precisely what is occurring in federal courtrooms across the country. Plaintiffs routinely submit affidavits from experts or other plaintiffs' lawyers who testify that even the simplest of individual claims—such as disputes over whether a cellphone customer authorized charges for a roadside-assistance program—will cost hundreds of thousands

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[8] Indeed, the paid expert witness in this case performed precisely the same role in *Kaltwasser*, *supra*.

or millions of dollars to arbitrate. *E.g.*, *Cruz* v. *Cingular Wireless LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011); see also cases cited in note 6, *supra*; Br. of Chamber of Commerce of the United States at 10-13, *McKenzie Check Advance of Fla., LLC* v. *Betts*, No. SC-11-514 (Fla. July 1, 2011), *at* 2011 WL 4442948.

Indeed, one plaintiffs'-lawyer organization has posted model affidavits on its website. Public Justice, *Helpful Post-Concepcion court rulings*, http://publicjustice.net/case-documents/concepcion (visited Aug. 27, 2012).

2. Plaintiffs' ability to compel collateral judicial litigation conflicts with the FAA's policy favoring efficient and expeditious vindication of arbitration rights.

This "vindication-of-federal-statutory-rights" argument not only places a cloud of uncertainty around the enforceability of vast numbers of arbitration clauses, but also imposes drastically increased burdens and costs on the enforcement of arbitration agreements.

The Second Circuit's approach calls for an analysis in each case "based on its own record" (Pet. App. 29a), and—as noted above—it is becoming standard practice for parties resisting arbitration to retain experts to testify that arbitration is not feasible. Accordingly, the party seeking to enforce the arbitration agreement must be prepared with facts and its own expert testimony showing that individual arbitration is an "economically feasible means for enforcing [the plaintiffs'] statutory rights." *Id.* at 53a. Indeed, given the Second Circuit's repeated emphasis on petitioners' failure to provide facts disputing the expert's affidavit here (*id.* at 11a, 27a), parties seeking to en-

force arbitration agreements would be foolhardy to base their case solely on the irrelevance and inadequacy of a plaintiff's factual showing.

This evidentiary showdown over the feasibility of arbitration inevitably will devolve into a collateral litigation of the merits, with requests for plenary discovery, briefing, and argument over what types of evidence and analysis are needed to arbitrate the case and how expensive discovery and the arbitral hearing would be. The parties also can be expected to challenge the qualifications and methodology of each other's experts.

In light of these burdens, some parties to arbitration agreements inevitably will conclude that the fight to enforce them is not worth the bother: "Even if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause," and the "predictable upshot is that" arbitration will be "too expensive and too slow to serve any of its purposes." *Id.* at 139a-140a (Jacobs, C.J., dissenting from denial of rehearing en banc).

The burdens, and the resulting uncertainty, may lead some companies to abandon arbitration altogether. Businesses typically pay all or almost all of the consumer's or employee's share of arbitration costs.[9] But when there is no assurance that all claims will be arbitrated (or can be compelled into arbitration inexpensively), and a company must

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[9] *E.g.*, Am. Arbitration Ass'n, Consumer-Related Disputes Supplementary Procedures § C-8, http://www.adr.org/aaa/faces/aoe/gc/gc_search/gc_rule/gc_rule_detail?doc=ADRSTG_015806.

shoulder the additional costs of class-action litigation, subsidizing the costs of individual arbitration may no longer be a rational business option.

Moreover, the judicial resources that would be devoted to presiding over this satellite litigation would be enormous. That is why this approach "is unworkable as a practical matter of judicial administration." *Kaltwasser*, 812 F. Supp. 2d at 1049.[10]

C. This Court Should Not Delay Consideration Of The Question Presented.

The dramatic consequences of the Second Circuit's decision warrant immediate review by this Court. And nothing would be gained by waiting to grant review of this issue in a future case.

To begin with, because the issue turns entirely on the meaning of this Court's prior arbitration decisions—chiefly *Concepcion* and *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000)—further percolation in the lower courts would provide little useful information. This Court is best situated to explain the meaning of its own decisions.

In any event, there already is a diverse array of judicial thinking on the issue. The Second Circuit in this case alone has produced three panel opinions, a

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[10] The "vindication of federal statutory rights" argument has not met with success when the challenged arbitration clause provides extra incentives to plaintiffs who successfully pursue small claims (and thereby undercuts any contention that individual arbitrations would be economically infeasible). *E.g.*, *Coneff*, 673 F.3d at 1159. But few arbitration clauses include such provisions. And even in many of those cases, the party invoking arbitration has been forced to undergo costly, time-consuming satellite litigation regarding the potential costs of pursuing the claim in arbitration and the plaintiff's potential recovery.

concurrence in the denial of en banc review, and three dissents from that denial. And as the petitioners point out, the Third, Fifth, and Ninth Circuits have issued decisions reflecting reasoning and results that diverge significantly from the Second Circuit's approach. Pet. 22-27. The Eleventh Circuit has done so as well. *Cruz*, 648 F.3d at 1214; *Pendergast* v. *Sprint Nextel Corp.*, 2012 WL 3553466, at *10-*11 (11th Cir. Aug. 20, 2012).

Nor is this the type of issue as to which this Court should await additional decisions by the courts of appeals. The Chief Judge of the Second Circuit dissented from the denial of rehearing en banc, stating that the panel's decision is squarely inconsistent with two of this Court's rulings.

And the practical effect of the panel's ruling is extremely far-reaching. That is because virtually every significant company that does business nationwide is subject to personal jurisdiction in New York—especially when federal claims are involved—and plaintiffs' lawyers accordingly will bring their nationwide class actions in New York to ensure application of the Second Circuit's "vindication" standard and avoid a possible loss on the issue in another court. Through this entirely predictable forum-shopping, the Second Circuit's standard effectively will become the national rule.

In the meantime, the FAA and this Court's decision in *Concepcion* would be short-circuited in numerous cases, with many businesses—as well as consumers and the market generally—deprived of the benefit of arbitration. Intervention by this Court now is essential to avoid that result.

II. THE DECISION BELOW FUNDAMENTALLY MISINTERPRETS *CONCEPCION* TO CREATE A DISTINCTION BETWEEN FEDERAL AND STATE CLAIMS NOT AUTHORIZED BY CONGRESS.

This Court's review also is warranted because the decision below flagrantly disregards this Court's reasoning in *Concepcion*, manufactures a distinction between federal and state claims not authorized by Congress in the FAA or any other federal statute, and arrogates to courts new authority to invalidate arbitration agreements.

A. The FAA Bars Courts From Conditioning Enforcement Of Arbitration Agreements On The Availability Of Class Procedures.

1. Concepcion's interpretation of the FAA governs the arbitrability of all claims, including federal statutory claims, unless Congress expressly commands otherwise.

Concepcion's holding rested entirely on this Court's conclusion that "class arbitration" is "not arbitration as envisioned by the FAA," because it lacks the speed and efficiency of individual arbitration, requires the burdens and "formality" of class-action litigation, and "greatly increases risks to defendants" given the magnified stakes and absence of meaningful judicial review. 131 S. Ct. at 1751-1753. Requiring parties to arbitration agreements to subject themselves to class proceedings as the price of admission to the arbitral forum, the Court held, would "interfere[]" with the FAA's objective of "promot[ing] arbitration." *Id.* at 1749-1750.

To be sure, *Concepcion* was a preemption decision because the anti-arbitration rule before the Court was embodied in state law. But this Court's holding rested squarely on its interpretation of the FAA—that "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The interference with the FAA is no less pronounced when a plaintiff contends that the inability to "vindicate" a federal claim (as opposed to "vindicate" a claim under state law) mandates the availability of class proceedings. In that situation, as well, requiring class procedures "creates a scheme inconsistent with the FAA."

Concepcion's interpretation of the FAA could be inapplicable here only if the FAA embodied a different, and more restrictive, standard for arbitration of federal claims than the test applicable to state claims. That might justify refusing to enforce an agreement for individual arbitration of federal claims in circumstances in which the same agreement would be enforced with respect to state claims.

But this Court reiterated just this year that the FAA's mandate to "enforce arbitration agreements according to their terms" applies "*even when* the claims at issue are federal statutory claims." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 667, 669 (2012) (emphasis added). The FAA does not specify separate procedures—or standards—for determining the enforceability of arbitration agreements depending on whether state or federal claims are at issue. See 9 U.S.C. § 2.

2. Congress has not excluded federal antitrust claims from the FAA's coverage.

Federal and state claims stand on a different footing under the FAA in one respect: Congress, unlike a state legislature, may exclude from the FAA's pro-arbitration mandate a statutory right that Congress creates. But the Court has repeatedly held that "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Neither respondents nor the Second Circuit rely on such a congressional determination. Pet. App. 17a n.5 ("[p]laintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions").

Nor could they, because this Court has repeatedly held that federal antitrust claims may be arbitrated. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[i]t is by now clear that statutory claims"—including "claims arising under the Sherman Act"—"may be the subject of an arbitration agreement, enforceable pursuant to the terms of the FAA"); *Mitsubishi Motors*, 473 U.S. at 636.

Moreover, Congress has not evinced any intent to require class procedures for antitrust claims. The Sherman and Clayton Acts were enacted more than a half-century before the creation of the modern class action. Just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S. Ct. at 1752), class arbitration and class-action litigation did not exist when Congress passed the Sherman Act in 1890 and the Clay-

ton Act in 1924. Congress's enactment of those statutes could hardly have mandated a procedure not yet in existence.

Indeed, as this Court has noted, in enacting the Sherman Act, Congress specifically "rejected a proposal to allow a group of consumers to bring a collective action as a class." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). And in subsequently enacting the Clayton Act, Congress did not discuss class proceedings at all. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 27 (1989).

The court below nonetheless concluded that individual arbitration of the plaintiffs' antitrust claims would "conflict with congressional purposes manifested in the provision of a private right of action in the [Sherman Act]." Pet. App. 17a n.5. But this Court rejected that contention in *Mitsubishi Motors*, explaining that "the fundamental importance ... of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634; see *id.* at 634-640. There is no "inherent conflict" (*Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987)) between individual arbitration and the purpose of the antitrust laws; claimants can recover the same individual remedies (such as treble damages and attorneys' fees) in arbitration as in court. Moreover, in *CompuCredit* the Court rejected the notion that "the mere formulation of the cause of action" in a statute is "sufficient to establish the contrary congressional command overriding the FAA." 132 S. Ct. at 670 (internal quotation marks omitted).

3. Courts are not authorized to undertake case-by-case assessments of whether class procedures are "necessary" to "vindicate" a federal claim.

The Second Circuit pointed to this Court's statement in *Green Tree Financial Corp.-Alabama* v. *Randolph* that it would invalidate an arbitration clause if "the existence of large arbitration costs [were to] preclude a litigant ... from effectively vindicating her federal statutory rights." 531 U.S. at 90. But *Randolph* is wholly inapplicable here.

That case involved a plaintiff's contention that an arbitration clause was unenforceable because it did not "affirmatively protect [her] from potentially steep arbitration costs," such as "filing fees, arbitrators' costs, and other arbitration expenses." 531 U.S. at 82, 84. While rejecting that challenge as speculative, this Court indicated that courts could "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive" in order to ensure that the plaintiff "'effectively may vindicate'" her statutory rights in arbitration. *Id.* at 90, 92 (quoting *Gilmer*, 500 U.S. at 28) (quoting in turn *Mitsubishi Motors*, 473 U.S. at 637)).

Contrary to the Second Circuit's view, this "vindication" principle applies only when an arbitration agreement imposes on the claimant excessive costs *unique to arbitration*—*i.e.*, costs that would not be incurred if the claim were instead brought in a judicial forum. Thus, *Randolph* refers to "*arbitration* costs" (531 U.S. at 90 (emphasis added)) and "*arbitration* expenses" (*id.* at 84 (emphasis added)), and the two examples it offers—"filing fees" and "arbitrators' costs" (*ibid.*)—both are costs imposed as a consequence of the arbitral forum.

Indeed, this Court in *Gilmer rejected* the argument that the unavailability of class procedures is a valid basis for refusing to compel arbitration of a federal claim. As this Court explained, "the fact that the [federal statute at issue] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32 (internal quotation marks omitted).

Moreover, the Second Circuit did not conclude—and plaintiffs did not contend—that the cost of accessing the arbitral forum is "prohibitively expensive" when compared to the costs of filing a case in court. Instead, the Second Circuit simply assumed, erroneously, that the "vindication" principle identified in *Randolph* extends to cases in which the cost of proving the claim—whether in court or in arbitration—is high in relation to its value.[11]

The Second Circuit's interpretation of *Randolph* also directly conflicts with *Concepcion*'s rejection of the dissent's argument that class procedures must remain available because some claims are too small to be worth pursuing on an individual basis. 131 S. Ct at 1753; see also *Coneff* v. *AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012).

For this reason, the Kentucky Supreme Court recently explained that, under *Randolph* and *Concep-*

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[11] The argument for requiring class procedures was stronger in *Gilmer* than it is here, because the ADEA—unlike the antitrust laws—expressly provides for collective actions (see 29 U.S.C. § 626(b)). Nevertheless, this Court stated that ADEA claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." 500 U.S. at 32 (internal quotation marks omitted).

cion, "arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, because, for example, the arbitration costs on the plaintiff are prohibitively high [compared to court filing costs]; or the location of the arbitration is designated as a remote location. But again, simply the impracticality of pursuing a single, small dollar claim is not regarded as an impediment to vindicating one's rights." *Schnuerle* v. *Insight Commc'ns, Co.*, 2012 WL 3631378, at *8 (Ky. Aug. 23, 2012); see also *Kaltwasser*, 812 F. Supp. 2d at 1049 ("it is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake").

Finally, the Second Circuit's overbroad interpretation of *Randolph* must be rejected for an additional reason. It would create a significant limitation on the enforceability of arbitration agreements not grounded in any recognized legal authority in this area. Nothing in the FAA, the antitrust laws, any other federal statute,[12] or federal common law permits a court to undertake its own case-specific factual investigation of whether a federal claim can feasibly be pursued only in a class action.[13]

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[12] Federal Rule of Civil Procedure 23 cannot justify the "vindication of rights" standard, because it may not "enlarge, or modify any substantive right." 28 U.S.C. § 2072(b).

[13] Indeed, the FAA was specifically enacted to end "judicial hostility to arbitration agreements," which manifested in a "great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1745. The Second Circuit's malleable "vindication of statutory rights" approach is akin to those anti-arbitration "devices and formulas."

B. The Policy Arguments Underlying The Second Circuit's Ruling Provide No Basis For Overriding Congress's Determinations In The FAA.

At bottom, the Second Circuit's misguided application of the "vindication-of-federal-statutory-rights" test rests on the very policy argument rejected by the Court in *Concepcion*. The dissent argued that "non-class arbitration over [small] sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold)." 131 S. Ct. at 1761 (Breyer, J., dissenting). The Court responded that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

The panel's policy concern is not only irrelevant for the same reasons, but also is wrong on its own terms.

First, the Second Circuit's case-specific standard ignores that arbitration agreements apply to a wide range of potential disputes. A large number of those disputes could be characterized as "economically infeasible" to bring in court because they involve individualized claims involving amounts too small to justify invocation of complex judicial procedures that typically require the retention of counsel.[14] The simple procedures that are the hallmark of arbitration,

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[14] Survey data indicate that a potential recovery must exceed $60,000 to attract contingent fee counsel, for example. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. May-Jul. 2003, at 9, 10-11.

by contrast, make it possible for the parties to vindicate rights that would not be redressable in court. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995).

The panel's analysis also ignores the savings that arbitration produces in connection with the resolution of all disputes because of procedures that are quicker, less burdensome, and more efficient than the judicial process. See note 2, *supra*.

By ignoring the range of claims subject to the arbitration clause—and the resulting benefits in terms of significantly reduced overall costs as well as the ability to vindicate claims that cannot practically be pursued in court—the Second Circuit's standard produces an incomplete and fundamentally skewed analysis. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (unconscionability of contract assessed as of the time of contracting, not based on facts that ultimately develop).

Second, the court erroneously assumed that a plaintiff who arbitrates an individual antitrust claim will inevitably face the same hurdles and obstacles as a plaintiff who pursues a class action in court. In fact, arbitration is much more informal than litigation, and spares litigants from the rigors of the federal rules of evidence and civil procedure. In addition, in individual arbitration there is no need for the plaintiff to spend months or years litigating whether there are common questions of fact or law that predominate over individualized issues or whether the plaintiff can adequately represent the interests of the putative class.

Litigating these class-certification issues—which Federal Rule of Civil Procedure 23 and due process

necessitate and which may involve millions of dollars in costs—all come before the parties confront the merits of their dispute. Individual arbitration, by contrast, gets immediately to the heart of the merits, securing faster and more affordable resolution of claims for all parties involved.

Third, the court of appeals incorrectly assumed that each individual claimant must reinvent the wheel in each proceeding. In fact, however, nothing prevents claimants (or their attorneys) from sharing the expenses of expert witnesses, fact investigation, and attorney preparation. In this case, the plaintiffs are businesses that belong to a trade association that could facilitate the organization process. Although petitioner's arbitration agreement includes a provision requiring that arbitration proceedings be kept confidential (Pet. App. 92a), that requirement would not prevent plaintiffs from collectively preparing their arbitration demands and assembling the evidence for their *prima facie* cases before arbitration begins.

In sum, even if policy analysis were the relevant standard—which it is not—the Second Circuit's "vindication-of-federal-statutory-rights" test could not be justified on that basis. Rather, enforcing parties' arbitration agreements will produce greater access to fair and efficient dispute resolution procedures—for businesses and their customers and employees alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-133

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Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF MARCY S. COHEN, AUGUSTUS I. DUPONT, HAYWARD D. FISK, WILLIAM GRAHAM, FRANK R. JIMENEZ, ROBERT LONERGAN, and CLIFFORD B. STORMS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim.

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INTEREST OF *AMICI CURIAE*[1]

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[1] *Amici* have given notice of intent to file this brief to all parties more than 10 days before this brief was filed. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

The views expressed in this brief are those of the individual *amici*, and not those of the companies or organizations with which they are currently or were previously affiliated.

for nearly 20 years. Previously, he was Vice President and Associate General Counsel of a major publicly traded telecommuncations company, listed on the New York Stock Exchange. Mr. Fisk served on the international board of the Association of Corporate Counsel, and on the national board of the American Society of Corporate Secretaries. Prior to his retirement from the full-time practice of law, he was a senior partner of DLA Piper LLP (US).

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Clifford B. Storms is the former Senior Vice President and General Counsel of CPC International, a publicly traded company listed on the New York Stock Exchange. He is a former member of the Connecticut ADR Panel and the Panel of Arbitrators of the American Arbitration Association Large Complex Case Program. Mr. Storms was a Trustee Emeritus of the Food and Drug Law Institute and a former member of the Advisory Committee of the Parker School of Foreign and Comparative Law, Columbia University.

Amici have served as senior legal officers for public companies for many years. They are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of *amici* have had decades of experience with arbitration – as legal counsel parties, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. *Amici* are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

Amici believe that the decisions of the Second Circuit in this case are inconsistent with the purposes of the Federal Arbitration Act ("FAA") and both the long-standing and recent teaching of this Court and will deter many companies from

incorporating arbitration as a dispute resolution mechanism in their commercial dealings.

PRELIMINARY STATEMENT

The underlying arbitration involves an antitrust claim. At issue is a provision, of a kind commonly used in arbitration agreements, that bars class actions and class arbitration. In *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*), the Second Circuit panel held that such a bar ran afoul of the federal "substantive law of arbitration" because the litigation expense of proving an antitrust claim – specifically expert testimony – would make it too expensive for claimants to pursue individual arbitrations. The panel held that a class action may proceed in court notwithstanding the agreement to arbitrate. *Id.* at 320.

This Court granted certiorari and vacated *Amex I* in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) ("*Stolt-Nielsen*").[2]

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[2] *Stolt-Nielsen* holds that a party to an arbitration agreement cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party *agreed* to do so...because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775. In this case, the arbitration clause explicitly prohibits class arbitration.

Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

On remand the two-judge panel reached the same conclusion as it had in *Amex I*. *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (*Amex II*), relying on the same "expert evidence" proffered by the merchants as to the high cost of producing expert evidence to support their claims.

Shortly after the opinion in *Amex II* was filed, but before the mandate issued, this Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*"), in which the Court held that state law may not be invoked to invalidate a class-action waiver in an arbitration agreement on the ground that the only economical way to litigate the claim is through a class action. *Id.* at 1748.

After supplemental briefing on the impact of *Concepcion*, the Second Circuit panel issued its third opinion, *In re Am. Express Merchs.' Litig.*, 634 F.3d 187 (2d Cir. 2011). *En banc* review was denied, *In re Am. Express Merchs' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("*Amex III*"). In *Amex III*, the panel again concluded, relying on the same affidavit of a consultant for the merchants, that expert costs would be so high relative to potential recovery that the only effective way to litigate the antitrust claims was by a class action and that the

class action waiver is unenforceable. *Amex III*, 667 F.3d at 218-219.[3]

SUMMARY OF ARGUMENT

Certiorari should be granted because the Second Circuit's decision in *Amex III* is inconsistent with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* and this court's teaching on enforceability of arbitration agreements.

The Second Circuit's opinions impair the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration and demonstrate the very longstanding judicial hostility to arbitration agreements the FAA was designed to eliminate. The *Amex* decisions are based on a concern that without the class-action vehicle claimants and lawyers will be willing to pursue "small" claims. However, this Court in *Concepcion* rejected this policy rationale and held that the argument that plaintiffs do not have sufficient incentive to pursue individual claims cannot undermine the FAA.

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[3] The Second Circuit recognized that in light of *Stolt-Nielsen* it could not require American Express to participate in class action arbitration, but by declaring the class action waiver unenforceable it opened the way for the merchants to pursue a class action in court, imposing an even greater economic burden on the party which sought to enforce the arbitration clause that contains a class-arbitration waiver.

Amex III is incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements.

Certiorari review is needed because *Amex III* creates an exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties and swallows the rule established this Court's recent teaching on the enforceability of arbitration agreements that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings. Certiorari is warranted to clarify the reach of *Concepcion* and whether there is a "federal statutory small claims" exception to the FAA.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge the Court to grant the petition for certiorari to clarify its holdings in *Concepcion*, *Stolt-Nielsen* and other cases, which recognize the overriding Congressional policy of encouraging arbitration and to make it clear that there is no "public policy" exception to that overriding policy simply based on the cost of arbitration relative to the potential recovery in individual arbitration.

The Second Circuit used "public policy" to hold that arbitration agreements containing class-action waivers are unenforceable when applied to federal statutory claims if a claim would not be "economically rational" to pursue individually. *See In re Am. Express Merchs.' Litig.*, 667 F.3d at 214.

The Second Circuit's opinions impair the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration by multiplying claims, lawsuits, and attorneys' fees. *Amex I, II and III* demonstrate that the very "longstanding judicial hostility to arbitration agreements," *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 24 (1991), the FAA was enacted to overcome, is undiminished.

The *Amex* decisions are based on a concern that without the ability to aggregate claims through a class-action lawyers will be unwilling to pursue "small" claims. Whether factually correct or not (the Second Circuit does not cite any record evidence to support such an hypothesis), *Concepcion* rejected this policy rationale. *See Concepcion*, 131 S. Ct. at 1753 (rejecting the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," because rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons"); *see also Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) (rejecting the argument that plaintiffs do not have sufficient incentive to pursue individual claims as "primarily a policy rationale" that "cannot undermine the FAA").[4]

Amex III does not properly read the FAA and this Court's cases. The Second Circuit's doctrine it makes it likely that federal district courts will be the initial venue for what should be arbitration

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[4] In *Coneff*, a putative class of AT&T wireless customers sued AT&T on a variety of claims, including a violation of the Federal Communications Act. The Ninth Circuit held that *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), was no obstacle to the enforcement of the class arbitration waiver.

issues on the merits[5], and can be used to defeat class-action waivers altogether.

Amex III is incompatible with the FAA as it has been applied and explained by this Court repeatedly and recently. The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." The FAA "establishes that, as a matter of federal law, any

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[5] *Amex III* effectively requires a judicial proceeding whenever a class claim based on federal law is asserted. The party seeking to arbitrate the individual claims in accord with the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months of court proceedings to enforce the arbitration clause. Courts will have to inquire into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata, whether the putative class is proper and whether the named the named claimant is a proper class representative, whether and what and how much expert testimony would be required and how costly it would be, and how much discovery is appropriate. Because *Amex III* repeatedly relies on the failure of American Express to rebut the merchants' expert affidavit on the cost of expert proof (*see, e.g., Amex III*, 667 F.3d 204, 218), a party seeking to enforce arbitration will have to spend considerable resources to engage its own consultant to rebut claims of the economic infeasibility of pursuing claims in individual arbitrations. The issues the trial court decides may create grounds for appeal, adding more expense and delay.

doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 & n.32 (1983). Section 2 of the FAA reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital* at 24,[6] and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center,*

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[6] *Amex III* effectively requires a judicial proceeding whenever a class claim purportedly based on federal law is asserted. The party seeking to arbitrate the individual claims in accord with the plain language of the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months of court proceedings to enforce the arbitration clause and commence arbitration. Courts will have to inquire into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata, whether the putative class is proper and whether the named the named claimant is a proper class representative, whether and what and how much expert testimony would be required and how costly it would be, and how much discovery is appropriate. Because *Amex III* repeatedly relies on the failure of American Express to rebut the merchants' expert affidavit on the cost of expert proof (*see, e.g., Amex III*, 667 F.3d 204, 218), a party seeking to enforce arbitration will have to spend considerable resources to engage its own consultant to rebut claims of the economic infeasibility of pursuing claims in individual arbitrations. The issues the trial court decides may create grounds for appeal, adding more expense and delay.

West, Inc. v. Jackson, 130 S.Ct. 2772 (2010); *Stolt-Nielsen* at 1774; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), and courts must enforce arbitration agreements according to their terms, *Volt Information Sciences, Inc.*, 489 U.S. 468, 478; *Stolt–Nielsen* at 1763; *Concepcion* at 1748. Section 2's saving clause permits agreements to be invalidated by "generally applicable contract defenses," but does not permit arbitration agreements to be negated by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Concepcion* at 1742-43.

Concepcion reaffirmed that the "overarching purpose" of the FAA

> is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concepcion, 131 S. Ct. 1740.

The point of parties determining for themselves arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. From the perspective of parties who enter into arbitration agreements, there are substantial advantages to streamlined procedures: parties

may agree to "limit the issues subject to arbitration," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985), to arbitrate according to specific rules, *Volt, supra,* at 479, and to limit with whom they will arbitrate disputes, *Stolt–Nielsen, supra,* 130 S.Ct. at 1773." *Concepcion* at 1748-49.

Amex III is incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements. *Amex III* attempts to distinguish the Supreme Court's recent holding in *Concepcion* and relies on selective reading of *dicta*[7].

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[7] *Amex III* relies heavily on *dicta* in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). In *Green Tree*, a lender sought to compel a borrower to arbitrate claims she had raised under federal statutes. *Id.* at 83. The question was "whether [her] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." *Id.* at 89. The Court confirmed "that federal statutory claims can be appropriately resolved through arbitration," and "rejected generalized attacks on arbitration that rest on a 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants,'" *id.* at 89-90 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). The challenge failed because Randolph

(continued...)

Amex III can be used to challenge virtually every arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause. While it purports to take a case-specific approach, its wording is very broad:

> We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has

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[7](...continued)
advanced no evidence of the "cost" of the arbitration. *Id.* at 90.

A passage in *dicta* stated that "the existence of large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights." *Id.* at 90. However, "large arbitration costs" refers to the cost of participating in arbitration, such as "filing fees, arbitrators' costs, and other arbitration expenses." *Green Tree*, 531 U.S. at 84. *Amex III*, however, suggests that a claim that may be expensive to litigate can be deemed to entail excessive or uneconomic "arbitration costs," *Green Tree*, 531 U.S. at 84, not the cost of proving a claim.

Even if, *arguendo*, stands for the proposition *Amex III* asserts, we submit that it is inconsistent with this Court's holding in *Concepcion*. Although *Concepcion* was a federal-state "preemption" case, its dismissal of the "public policy" rationale advanced by Justice Ginsburg in dissent applies equally to this case. *See Concepcion* at 1753.

> suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

Amex III, 667 F.3d at 214. *Amex III* cites no cases to support these statements. Of course the "Supreme Court precedent" that "recognizes that the class action device is the only economically rational alternative" are cases decided in the context of disputes that were not subject to arbitration, and were governed procedurally by the Federal Rules of Civil Procedure.

Concepcion upheld the paramount policy favoring arbitration FAA against an unconscionability challenge that was substantively indistinguishable from the challenge in *Amex*. In *Concepcion*, the Supreme Court rejected a common-law rule, developed by the California Supreme Court, that was applied to void class-action waivers in contracts of all types. The discredited California court had said:

> [B]ecause . . . damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party

> from liability that otherwise would be imposed under California law, are generally unconscionable.

Discover Bank v. Superior Court, 36 Cal. 4th 148, 161 (2005) (internal quotation marks, citations, and alterations omitted). The Supreme Court ruled that this attempt by California to limit arbitration agreements was inconsistent with the FAA. *Concepcion* at 1748. The majority in *Concepcion* affirmed that rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons," and rejected Justice Ginsburg's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Id.* at 1753.

Amex III seeks to evade the clear language and import of *Concepcion*. As it had in *Amex II*, in *Amex III* the panel found that a class-waiver provision in an arbitration agreement is unenforceable if "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Amex III*, 667 F.3d at 218. *Amex III* tries to limit *Concepcion* to a "path for analyzing whether a state contract law is preempted by the FAA." *Amex III*, 667 F.3d at 213 (emphasis added). *Amex III* interprets *Concepcion* as deciding only whether California's doctrine of unconscionability was preserved by the FAA's savings clause as "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C.

§ 2. *Amex III* invalidates the arbitration agreement an almost identical type of "unconscionability" because the underlying claim was grounded in federal antitrust law." *Amex III*, 667 F.3d at 213.

The public policy rationale on which *Amex III* relies – that large "arbitration costs" should not prevent a plaintiff from "effectively vindicating" a statutory right – runs counter to the FAA's paramount public policy.[8] *Concepcion* teaches that the FAA does not allow courts to invalidate class action waivers even if "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Concepcion* at 1753. The theory on which *Amex III* relies to create an exception to the FAA and to distinguish *Concepcion* would swallow the rule favoring arbitration. Every plaintiff who wants to avoid arbitration can claim to be the representative of a class whose members suffered small damages and hire an "expert" to opine that litigation costs, including expert witness fees, would outweigh each class members's individual loss. The mere threat of a class action would likely prompt a settlement, even of dubious claims, rather than engage in protracted and expensive

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[8] Had Congress intended to exempt certain classes of disputes – such as those arising under the Sherman Act – from the FAA, it could have done so, but it has not.

litigation such as this American Express Merchant's saga.[9]

Amici submit that *Amex III* negates an otherwise valid arbitration agreement by conjuring up defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue, *Concepcion* at 1742-43, for the result the Second Circuit is determined to achieve is to compel a party to forego several of the principal benefits of arbitration, to wit, choice of arbitration parties, choice of issues to arbitrate,

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[9] This Court recently cautioned that certain class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 143 (1996); *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006) ("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.")

and a streamlined – and generally less expensive – process.[10]

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[10] As this Court noted in *Concepcion*, "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Concepcion* at 1750, citing *Stolt-Nielsen* at 1776. "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult." *Concepcion* at 1750. Arbitrators chosen for their subject-matter expertise are not usually familiar with the complex procedural aspects of class certification. *Concepcion* at 1750-51.

As this Court explained in *Concepcion*,

> Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior

(continued...)

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Concepcion* at 1742. There can be little doubt, we submit, that the Second Circuit's obdurate consistency in holding the contractual class action waiver to be unenforceable, and thus denying Petitioners their contractual right to arbitration – despite previous remands in light of important recent decisions of this Court – is precisely the sort of expression of continuing "judicial hostility towards arbitration ...manifested in a great variety of devices and formulas declaring arbitration against public policy" that prompted Congress to enact the FAA. *See Concepcion* at 1747 (internal quotation marks and citations omitted).

Certiorari review is needed because *Amex III* creates an exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. *Amex III* will be used to defeat class-action waivers altogether and it creates an exception that swallows the rule established by the

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[10](...continued)
by which the rights of any party have been prejudiced...."

Concepcion at 1752.

FAA and this Court's recent teaching on the enforceability of arbitration agreements.

Amex III creates a "Catch 22" – either an arbitration agreement must omit a class-action or class-arbitration waiver,[11] or, if the arbitration contract includes such a waiver, a court will nullify the waiver (and, perhaps the arbitration agreement *in toto*) and the parties will be compelled to litigate a class action in court, rather than arbitrate a manageable dispute. *Amex III*, if not reviewed and reversed, would thus negate the overarching purpose of the FAA which is to "facilitate streamlined proceedings" and to "ensure the enforcement of arbitration agreements according to their terms." *Concepcion* at 1748 (citation omitted); *see also Stolt-Nielsen* at 1763.

At a minimum, certiorari is warranted to clarify the reach of *Concepcion* and whether there is a "federal statutory small claims" exception to the FAA.

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[11] As this Court noted in *Concepcion* "[I]t [is] hard to believe that defendants would bet the company with no effective means of review [of an arbitral award], and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Concepcion* at 1752. We see no principled reason why federal courts should be able to do so.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition.

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AMICUS CURIAE BRIEF

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No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar ("DRI") is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership and to the judicial system. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010). Based on its members' extensive practical experience, DRI is uniquely well suited to explain why this Court should grant review and reverse the Second Circuit's opinion. If allowed to stand, the decision below will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration.

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[1] Letters of consent have been filed with the Clerk. Counsel of record received notice more than 10 days prior to the due date that *amicus* intended to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The petition presents a recurring issue of singular importance under the Federal Arbitration Act ("FAA"): in what circumstances, if any, may courts invalidate arbitration agreements that prohibit class-wide arbitration of federal claims. The enforceability of literally millions of arbitration agreements turns on the answer to this question. As the petition explains, the Second Circuit's ruling conflicts with the FAA in fundamental respects: by allowing parties to evade a clear and unambiguous class action waiver in an arbitration agreement on a showing that an individual federal claim is not economically feasible, the ruling undermines arbitration's recognized advantages, creates powerful disincentives to arbitration, and conflicts with the FAA's strong federal policy favoring arbitration agreements.

This *amicus* brief addresses reasons that the Court should resolve the question presented by the petition. The decision below makes the enforceability of arbitration agreements highly unpredictable for businesses with operations, vendors or customers dispersed regionally and nationally. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable in accordance with contractual terms. Moreover, by refusing to enforce the agreement at issue in this case, the court of appeals made clear that it has adopted a rule that contracts providing for arbitration on an individual basis are unenforceable whenever a plaintiff can produce evidence that its case depends on expert testimony.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

Commentators have already criticized the panel decision here and accurately opined that "the correctness of the Second Circuit's decision is very doubtful" in light of this Court's precedents. Blackman, Rozenberg & Sidhu, *Tackling Class Action Waivers in Arbitration Clauses*, N.Y.L.J. (June 11, 2012). Both *Stolt-Nielsen* and *Concepcion* clearly held that class claims are not appropriate subjects for arbitration unless the parties expressly agree otherwise, and *Concepcion* held that the FAA preempts state laws invalidating commercial arbitration agreements on the ground that they forbid class arbitration.

Despite the governing authority of *Stolt-Nielsen* and *Concepcion* the court of appeals felt bound by, in the panel's words, "dicta" (Pet. App. 19a, 22a) in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). In *Randolph*, this Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." 531 U.S. 79, 90 (2000).[2]

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[2] Other courts have also characterized this passage of *Randolph* as "dicta." *See, e.g., James v. Conceptus, Inc.*, – F. Supp.2d –, 2012 WL 845122, at *10 (S.D. Tex. 2012); *D'Antuono v. Service Road Corp.*, 789 F. Supp.2d 308, 334 (D. Conn. 2011); *Little v. Auto Stiegler, Inc.* 63 P.3d 979, 992 (Cal. 2003). Commentators have done likewise. *See, e.g.*, Drahozal & Wittrock, *Is There a Flight From Arbitration?*, 37 Hofstra L. Rev. 71, 110 n.181 (2008) (*Green Tree*'s "costs" language was

Treating that dicta as "controlling," the panel reaffirmed its prior conclusion that the arbitration agreement here is "unenforceable" because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive." Pet App. 24a, 25a (internal quotations omitted).

Certiorari is warranted to correct this erroneous holding. First, dictum is not binding, especially when more recent opinions counsel a different result. *See, e.g., Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (plurality opinion); *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it"); *Cohens v. Va.*, 6 Wheat. 264, 399-400 (1821) (Marshall, C.J.).

Second, *Randolph* expressly declined to address whether the arbitration agreement was unenforceable because of a class action waiver in the agreement. *See* 531 U.S. at 92 n.7. That issue is now squarely presented in this petition.

Third, even if the relevant language of *Randolph* were not dicta, the Second Circuit read too much into the decision. As explained fully by the petition, *Randolph* dealt only with costs unique to arbitration that could effectively foreclose access to the arbitral forum. *See* Pet. 18-19; *accord Kaltwasser*

"dictum"); Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake The Rules of Litigation in Arbitration's Image*, 30 Harv. J. L & Pub. Pol., 579, 588 n.28 (2007) (same); Jackson, *Green Tree v. Randolph: Will the Court's Decision Lessen The Effect of the FAA in Consumer Arbitration?*, 6 T.G. Jones L. Rev. 57, 60 (2002) (same); *see also* Pet. App. 143a-45a (dissenting opinions).

v. AT&T Mobility LLC, 812 F. Supp.2d 1042, 1049 (N.D. Cal. 2011)("[i]f *Green Tree* [*v. Randolph*] has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages."). In this case, the only supposedly excessive costs are for *experts*, not for the *arbitrators*. No decision from this Court extends *Randolph* to situations where such costs would be the same in both arbitration *and* litigation.

Fourth, even if the lower court read *Randolph* correctly, the panel's decision cannot be reconciled with *Concepcion*, which effectively rejected the "prohibitive costs" justification for conditioning enforcement of arbitration agreements on the availability of classwide arbitration procedures. The *Concepcion* dissent contended that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." *See* 131 S.Ct. at 1760 (Breyer, J., dissenting); *see also id.* at 1761 ("nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds"). But, the *Concepcion* majority made clear that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753 (majority opinion); *see also Stolt-Nielsen*, 130 S.Ct. at 1770 n.7 (essentially same).

Accordingly, the Second Circuit was wrong to rely on an argument posited by the dissent that the majority in *Concepcion* rejected. *See, e.g., Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012) (noting that *Concepcion* "majority expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"). The respondent in *Concepcion* repeatedly cited "costs" as a justification for invalidating the class waiver. *See* Brief for Respondent in No. 09-893, at 29, 41, 43-44, 51-52; *see also Hendricks v. AT & T Mobility, LLC*, 823 F. Supp.2d 1015, 1021 (N.D. Cal. 2011) (making same point). But the majority expressly rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S.Ct. at 1753. Had the view of the *Concepcion* respondent – espoused by the dissent – prevailed, the Court's judgment would have been different. *Cf. Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853); *see also Sumner v. Mata*, 455 U.S. 591, 596-97 (1982) (*per curiam*) (granting certiorari and vacating where the court of appeals on remand "reinstated" its prior conclusion, followed the "dissenting opinion" in the prior case before this Court, and "apparently misunderstood the terms of [this Court's] remand").

Even if *Concepcion* were incompatible with *Randolph*, then the court of appeals erred in not following the more recent of the two decisions. As this Court explained, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

v. Shearson/AMEX, Inc., 490 U.S. 477, 484 (1989); *see also Coneff*, 673 F.3d at 1158 (following *Concepcion* for similar reasons). This Court should grant certiorari to quell the existing disagreement whether *Concepcion* or *Randolph* controls the question presented in the petition.

The court of appeals' reliance on dicta from a footnote in *Mitsubishi*, 473 U.S. at 637 n.19, is even less supportable. *See* Pet. App. 19a, 50a, 94a, 128a.[3] This Court has never invalidated an arbitration agreement under the "prospective waiver" dicta from *Mitsubishi*. Further, as explained by the petition, this Court has clarified that the *Mitsubishi* footnote is relevant – if at all – only at the arbitral award-enforcement stage. *See* Pet. 21-22 n.13 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995)); *see also Lindo*, 652 F.3d at 1267 (same point). Yet the court of appeals here treated *Mitsubishi* as controlling at the pre-award stage. This misapplication of *Mitsubishi* should be corrected.

Nor does it matter (*see* Pet. App. 16a, 129a), that this case involves federal statutory rights rather than state contractual rights. *See* Blackman, Rozenberg & Sidhu, *supra* (predicting that "[t]he Supreme Court may find this to be a distinction without a difference, and reject the Second Circuit's

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[3] Again, there is no dispute that this language from *Mitsubishi* was dicta. *See, e.g., Lindo v. NCL (Bahamas), Ltd.* 652 F.3d 1257, 1266-67 (11th Cir. 2011); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295-96 (9th Cir. 1998) (en banc); *D'Antuono v. Service Road Corp.*, 789 F. Supp.2d 308, 332-33 (D. Conn. 2011); *Grynberg v. BP P.L.C.*, 596 F. Supp.2d 74, 78-79 (D.D.C. 2009).

view"); *accord* Pet. App. 143a ("This labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded"). *Concepcion* rested on the language of the FAA. Since that language governs to preempt conflicting state law under the Supremacy Clause, then *a fortiori* the same language governs federal law. Indeed, this Court has specifically held that the duty to enforce an arbitration agreement "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/AMEX, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *accord CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) (Age Discrimination in Employment Act does not preclude arbitration of claims brought under that statute); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-24 (2001) (arbitration not inherently inconsistent with enforcement of federal statutory rights). Surely nothing in the FAA or the federal antitrust statutes exempts antitrust claims from arbitration agreements. *See Mitsubishi*, 473 U.S. at 628, 632 (non-dicta direct holding in antitrust case).

Finally, it bears emphasis that, as the petition explains (Pet. 2, 10), the court of appeals has already been subjected to a grant, vacate, remand ("GVR") order from this Court for an earlier opinion invalidating the class arbitration waiver at issue. Although GVR orders *per se* do not constitute a "final determination on the merits" (*Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)), at a minimum, they signal a "reasonable probability" that the lower court decision was in error. *See Lords Landing Village*

Condominium Council of Unit Owners, 520 U.S. 893, 896 (1997) (per curiam).

Indeed, this Court has granted certiorari and reversed numerous lower court opinions that re-affirmed or reinstated an earlier disposition following a GVR order.[4] Given the numerous precedents that the Second Circuit effectively ignored or nullified in the opinion below, this Court should do so again here.

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH MULTIPLE CIRCUITS

Even if the court of appeals had not misread and misapplied this Court's precedents, certiorari is equally warranted to resolve an irreconcilable circuit split. *See* Pet. App. 148a. While the petition correctly notes that the decision below directly conflicts with three other circuits (*see* Pet. 22-27), the split is more acute. Even in the post-*Concepcion* period alone, at least three circuits have correctly interpreted *Concepcion* as repudiating "excessive costs" defenses to class waivers in arbitration agreements – all contrary to the Second Circuit holding.

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[4] *See, e.g., Smith v. Spisak*, 130 S.Ct. 676, 681 (2010); *Ayers v. Belmontes*, 549 U.S. 7, 10-11 (2006); *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195-99 (2001); *Powell v. Texas*, 492 U.S. 680, 681 (1989) (per curiam); *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (per curiam); *United States v. Sharpe*, 470 U.S. 675, 681 (1985); *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam); *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 47 (1970) (per curiam); *Henry*, 376 U.S. at 777; *Fields v. South Carolina*, 375 U.S. 44 (1963) (per curiam); *see also Youngblood v. W. Va.*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) (noting that GVR orders may sometimes be interpreted as "polite directives" that lower courts "reverse themselves").

In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, the Third Circuit upheld class waivers in arbitration agreements despite arguments that "class action litigation is the only effective remedy such as when the high cost of arbitration compared with the minimal potential value of individual damages denies every plaintiff a meaningful remedy." 673 F.3d 221, 232 (3d Cir. 2012) (citing *Concepcion*). As noted by the dissenting judges here (Pet. App. 138a, 141a, 148a-49a), the Ninth Circuit reached the same conclusion. *See Coneff*, 673 F.3d at 1159 ("Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that"). In so holding, the Ninth Circuit in *Coneff* followed the Eleventh Circuit, which likewise interpreted *Concepcion* as foreclosing "excessive costs" rationales to invalidate class arbitration waivers. *See Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011) (noting that plaintiffs produced evidence that it would be economically impractical to bring individual claims in arbitration, and agreeing that most of these small-value claims will go undetected and unprosecuted, yet nonetheless holding that "faithful adherence to *Concepcion* requires the rejection of the Plaintiffs' argument").[5]

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[5] Post-*Concepcion*, district courts are likewise questioning earlier decisions invalidating class arbitration waivers on the same grounds the court of appeals applied here. *See, e.g., Spears v. Mid-Am. Waffles, Inc.*, 2012 WL 2568157, at *2 n.2 (D. Kan. July 2, 2012) (opining that *Jones v. DirectTV, Inc.*, 667 F. Supp.2d 1379, 1382 (N.D. Ga. 2009) – which applied identical reasoning as the panel opinion in this case – was overruled by *Concepcion*).

Concurring in the denial of rehearing, Judge Pooler contended that the other circuits applying *Concepcion* dealt with "incentive" to bring claims, rather than "ability" to bring claims. Pet. App. 131a. But this, too, is a distinction without a difference. It is no more economically prudent to bring a small-dollar contractual claim to arbitration than it is to bring an antitrust claim. This Court has rejected "general policy goals" as a means of overriding an otherwise clear and unambiguous arbitration agreement. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *accord McMahon*, 482 U.S. at 240. Indeed, other courts have held that the Second Circuit decision is completely at odds with *Concepcion* and *Coneff*. *See, e.g., Jasso v. Money Mart Exp., Inc.* – F.Supp.2d –, 2012 WL 1309171, at *7 (N.D. Cal. 2012) (rejecting *AMEX III*); *Brokers' Services Marketing Group v. Cellco Partnership*, 2012 WL 1048423, at **3-5 (D.N.J. Mar. 28, 2012) (rejecting same argument that *AMEX III* adopted and following *Concepcion* and *Coneff*).

The inherent unpredictability stemming from the current variation from jurisdiction to jurisdiction substantially undermines the certainty and value of the federal right to enforcement of arbitration agreements. The resulting uncertainty is especially vexing for businesses with operations, vendors or customers dispersed regionally and nationally. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 n.32 (1983) (the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"). "Once rare, class action waivers are today included in millions of credit card and other financial services agreements nationwide." Kaplinsky & Levin, *Is*

JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?, 61 Bus. Law. 923, 923 (Feb. 2006) (footnote omitted); Rice, *The Battle of Enforceability: Class Action Waivers in Mandatory Arbitration Clauses*, 27 Banking & Fin. Servs. Policy Rep. No. 4 at *1 (April 2008) (essentially same). When, as in this case, parties have done everything possible to memorialize – in the clearest and most unambiguous of terms – their agreement that there be no class adjudication, the existing uncertainty cannot be justified.

Although the impact of this issue resonates through all industries and sectors of the economy, prompt resolution of this issue is singularly urgent for employers and their attorneys. Earlier this year, the National Labor Relations Board ("NLRB") held that requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class claims) violated the National Labor Relations Act ("NLRA") because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. *See In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012). Although no court of appeals has yet spoken on the matter, district courts are already deeply divided on whether *D.R. Horton* is consistent with this Court's precedents.[6] Unless this

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[6] *Compare Delock v. Securitas Sec. Servs. USA, Inc.*, – F. Supp.2d –, 2012 WL 3150391, at **4-5 (E.D. Ark. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at *9 (N.D. Cal. May 7, 2012); *Jasso*, – F. Supp.2d –, 2012 WL 1309171 at **7-10; *Palmer v. Convergys Corp.*, 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *and LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (all rejecting *D.R. Horton*); *with Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012); *and*

Court resolves the issue presented in this case, employers will remain in an unsustainable limbo, caught between the demands of privacy law governing individual personnel records and the NLRB's newly-minted unfair labor practice edict.[7]

It is therefore essential that the Court resolve the question presented so that arbitration agreements enforceable in the vast majority of jurisdictions are not rendered unenforceable by the anti-arbitration hostility of the Second Circuit. In the current state of affairs, clients cannot be reliably counseled on how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-*

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v. Bristol Care, Inc., 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) (following *D.R. Horton*).

[7] Further, even if employers wished to avoid the NLRB's wrath and entered into arbitration agreements that did not have an express waiver of class procedures, this would only lead to additional uncertainty. Courts of appeals are currently split on whether arbitration agreements that are "silent" regarding class procedures evince assent to class arbitration, or whether class arbitrations are permissible under *Stolt-Nielsen* only when the agreement explicitly allows them. *Compare Sutter v. Oxford Health Plans, LLC*, 675 F.3d 215, 223-25 (3d Cir. 2012) (class arbitration permissible even when agreement "silent" on class procedures), *pet. for certiorari filed*, No. 12-135 (July 27, 2012); *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114, 119-27 (2d Cir. 2011) (same), *cert. denied*, 132 S. Ct. 1742 (2012) *with Reed v. Fla. Metro. Univ. Inc.*, 681 F.3d 630, 638-46 (5th Cir. 2012) (no class arbitration unless agreement expressly allows it). DRI is submitting an *amicus curiae* brief in No. 12-135 urging that the Court grant the petition for certiorari. Each case – *Sutter* and this one – independently warrants certiorari. Since both are pending at the same time, the Court has an ideal opportunity to resolve pressing questions concerning the availability of class arbitration in a broad context that will greatly benefit millions of businesses and individuals. Accordingly, DRI proposes that both petitions should be granted.

Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 279 (1995). As matters now stand, lawyers advising clients regarding class action waivers in arbitration agreements can only offer the following advice on the enforceability of such clauses:

- They are enforceable against state claims (unless arbitrators or courts concoct new ways to limit for circumlocute *Concepcion*).

- Depending on the jurisdiction, they may or may not be enforceable against federal claims (and we aren't sure which ones).

- It will be very costly to litigate the enforceability of the waiver as applied to federal claims (just how costly will depend on the jurisdiction).

In *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984), this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." That, however, is precisely the result of the court of appeals' decision here.

III. THE QUESTION IS IMPORTANT, RECURRING, AND WELL-SUITED FOR REVIEW

Arbitration is the "oldest known method of settlements of disputes[.]" *McAmis v. Panhandle E. Pipeline Co.*, 273 S.W.2d 789, 794 (Mo. App. 1954).

This Court has long favored arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity"). Congress has confirmed the strong national policy in favor of arbitration by enacting the FAA. *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (citing several authorities); *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1203 (2012) (same); *Southland* 465 U.S. at 10.

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. Parties competent to enter into a contract are also competent to enter into an arbitration agreement. *United States v. Moorman*, 338 U.S. 457, 461-62 (1950). Absent a valid defense from the party opposing arbitration, courts are required to enforce arbitration agreements on their terms. *See, e.g., CompuCredit*, 132 S.Ct. at 669; *Concepcion*, 131 S.Ct. at 1745; *cf. The Harriman*, 76 U.S. 161, 173 (1869) ("It is the province of the courts to enforce contracts – not to make or modify them").

This Court has repeatedly recognized the benefits of arbitration: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g. Concepcion*, 131 S.Ct. at 1749; *Stolt-Nielsen*, 130 S.Ct. at 1775; *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard*, 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and

particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute"). As this Court aptly stated, "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7.

In contrast to *Southland*, the Second Circuit's approach is

> unworkable as a practical matter of judicial administration. Under his approach, every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiffs case. Defendants predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's costs of proof. It is highly doubtful that in striking down the *Discover Bank* rule [in *Concepcion*], the Supreme Court intended to open the door to such proceedings as a means for plaintiffs to avoid arbitration agreements.

Kaltwasser, 812 F. Supp.2d at 1049; *accord Hendricks*, 823 F. Supp.2d at 1021-22 (agreeing with above).

These same concerns were highlighted by the dissenting judges here. *See* Pet. App. 139a-40a. In short, the Second Circuit's approach cannot be

reconciled with "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. Allowing the decision below to stand would be "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275.

Nor is the court of appeals' decision bound to the facts of this case. As the dissenting judges pointed out, there is no reason to believe that the court of appeals' "excessive costs" reasoning would be limited to antitrust cases. Experts are routinely engaged in a variety of potential class claims. *See, e.g., Bell Atlantic Corp.* v. *AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003) (class certification properly denied when expert's formula "in no way account[ed] for the vast differences among those class members," and "[a]ny reasonable approximation of damages actually suffered by the various class members" would require "individualized damages inquiries").[8] Indeed, Chief Judge Jacobs' dissent noted that the court of appeals' ruling "can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause." Pet. App. 137a.

Commentators have already warned that, if allowed to stand, the decision below "could have the

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[8] This Court granted certiorari in *Comcast Corp. v. Behrend*, No. 11-864 (oral argument scheduled Nov. 5, 2012) to resolve whether "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." DRI filed an *amicus brief* in that case supporting petitioner.

effect of preventing arbitration of any kind in cases where a federal statutory claim is asserted on behalf of a purported class, thereby forcing a corporate defendant into the very sort of judicial class action that it can be presumed to have wished to avoid through an arbitration agreement." Blackman, Rozenberg & Sidhu, *supra*. *Cf.* Rice, *Enforceable or Not?*, 45 Hou. L. Rev. at 224 (characterizing "the use of the class-action arbitration bans as a legitimate contract tool used to defend[] companies from the ever-increasing onslaught of frivolous multimillion-dollar class action lawsuits"). "This would be a paradoxical result indeed, and one difficult to square with the Supreme Court's decided preference for upholding arbitration agreements." *Id.*

Experience teaches – as Congress and the courts have perceived – that class actions can give rise to unacceptable abuses and risks wholly unrelated to whether the claim has the slightest merit. For example,

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677-78 (7th Cir. 2009).

The overwhelming majority of class actions have resulted not in adjudication to final judgment on their merits, but settlements. *See Concepcion*, 131 S.Ct. at 1752 (recognizing "risk of 'in terrorem' settlements that class actions entail"; citing *Kohen*, 571 F.3d at 677-78).[9] As this Court noted, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*; *accord Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (noting pressure for defendants to settle class actions, even if adverse judgment seems "improbable"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). But if companies are to protect themselves from the high costs of litigation and the potential of paying damages on "frivolous" class claims then the public would undoubtedly benefit. *See* Rice, *Enforceable or Not?*, 45 Hou. L. Rev. at 247 ("Because companies are able to keep their costs

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[9] Empirical studies and numerous commentators confirm the indisputable point that "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies...confirm what most class action lawyers know to be true"); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial"); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices").

This case is an ideal vehicle for resolution of these important practical issues because the question is presented in a gateway context, with the justifications for class action treatment at their absolute nadir. The plaintiffs are all businesses that entered into contracts expressly precluding class-wide adjudication. The individual claims are in the thousands of dollars. If a class action waiver is unenforceable here, when would one be enforceable? Typically, when individual claims are minimal the stated justification for class-wide adjudication is that otherwise there would be no remedy to deter defendants from engaging in the conduct that is challenged. Whatever validity that contention may have in a situation where the claims have merit, the reality of the vast majority of class action cases is that the merits are never tested. And, when the claim is that a defendant violated a federal statute – here, the antitrust laws – there are ample public enforcement authorities with full power to seek remedies that provide any appropriate deterrent effect. The Second Circuit's standard turns on the cost of employing experts as compared to the potential benefit of successful litigation. There are powerful reasons to prefer public enforcement officials as the parties responsible for making that cost-benefit analysis. The reality is that government enforcement efforts, in antitrust and other regulated areas, are routinely magnets for tag-along private class actions that follow in the government's footsteps at a fraction of the cost of original litigation. In contrast, a decision by private attorneys to incur massive costs they hope eventually to impose on the

defendant for claims that will almost certainly never be tested on the merits provides little assurance that the public interest is being served. There is, accordingly, scant justification to subject defendants to the risks of paying these costs, along with their own litigation costs (including defense experts), while facing the risk of massive potential liability for claims whose merits will likely never be resolved.[10]

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[10] *See, e.g., Kamm v. Cal. City Devel. Co.*, 509 F.2d 205, 212-13 (9th Cir. 1975) (government better suited to remedy harm than private class action); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D.N.J. 1998) ("[T]here is insufficient justification to burden the judicial system with Plaintiffs' claims while there exists an administrative remedy that has been established to assess the technical merits of such claims"); *Brown v. Blue Cross & Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 45-47 (E.D. Mich. 1996) (holding that defendants' settlement agreement with state attorney general and insurance commissioner adequately served the interests of the proposed class and, therefore that a class action was unnecessary). Moreover, government enforcement minimizes the possibility of conflicts between potential victims, returns more dollars to consumers without payment of counsel fees; the government is better positioned than the private bar to prioritize investigations and prosecutions without the need to comply with costly class action administrative requirements. *See, e.g.*, Griffin, *Reinventing Adequacy: The Need for Standardized Regulation*, 23 Geo. J. Legal Ethics 603, 613-16 (2010) (making similar points).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 29, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

In the

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *ET AL.*,

Petitioners.

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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August 28, 2012

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INTEREST OF AMICUS CURIAE

New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether certiorari should be granted in this case to decide whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), as interpreted by this Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), should permit courts to override the FAA's mandate and invalidate an arbitration agreement that would require the arbitration of federal statutory claims on an individual basis only, and the plaintiff argues that he would be unable to "vindicate his federal statutory rights" due to the cost of proving his case on an individual basis.[1]

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that all parties were provided with ten-day written notice of NELF's intent to file this brief, which NELF's counsel emailed to counsel for all parties on August 15, 2012. Moreover, on August 14 and on August 22, 2012, counsel for Petitioners and counsel for Respondents respectively filed with this Court general written consents to the filing of amicus briefs, in support of either or neither party.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF has long been committed to a reasonable interpretation of federal statutes affecting the rights of corporations in their contractual relationships with other corporations and with individuals. In this connection, NELF filed an amicus brief in *Concepcion*, in support of the enforcement of class action waivers in arbitration agreements. The Second Circuit's decision in this case is of direct importance to NELF's corporate constituents, many of whom make use of pre-dispute arbitration agreements containing class action waivers and who might be threatened with class action litigation based on federal statutory claims.

In NELF's view, and in the view of its corporate constituents, certiorari should be granted to correct two significant errors of law contained within the Second Circuit's opinion. First, the lower court has apparently

misinterpreted *Concepcion*, which is broadly reasoned and should apply to the arbitration of federal statutory claims and should preclude either a categorical or case-specific invalidation of a class action waiver. *CompuCredit* establishes that only Congress can override the FAA's mandate, such as by creating an unwaivable right to seek a class action in the relevant federal statute. Congress has not done so here in the Sherman Act, 15 U.S.C. §§ 1 *et seq*.

Secondly, NELF believes that the Second Circuit has misinterpreted *Green Tree* and related precedent of this Court discussing the vindication of federal statutory rights. The Second Circuit has interpreted the "vindication" inquiry as authorizing courts to set aside the FAA and invalidate a class action waiver when it applies to federal claims, due to the costs associated with proving a claim on an individual basis, as opposed to a classwide basis. *Concepcion*, however, has expressly rejected this argument. Moreover, the "vindication" inquiry should refer exclusively to the costs or burdens unique to arbitration that are created by agreement and that do not exist in court. The class action waiver should survive scrutiny under *Green Tree* because, among other things, it does not create unique arbitration costs but instead concerns the allocation of the necessary costs of proof, which are extra-contractual and would apply equally in court.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to both the New England and the national business communities.[2] This is such a case, and NELF believes that its brief would provide an additional perspective to aid this Court in deciding whether to grant certiorari to resolve the issue presented herein.

SUMMARY OF ARGUMENT

Certiorari should be granted to clarify that, contrary to the Second Circuit's opinion in this case, this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), broadly establishes that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), requires enforcement of a class action waiver. General enforcement of a class action

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[2] *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

waiver is necessary to serve the FAA's core purpose of ensuring party autonomy in the crafting of streamlined *individual* proceedings. Conversely, *Concepcion* also broadly establishes that invalidation of a class action waiver, under any circumstances, frustrates the FAA's core purpose, because invalidation requires classwide arbitration as a condition of the agreement's enforceability, and compelled classwide arbitration would defeat both the parties' intent and the FAA's core purpose of enforcing the agreement's terms so as to ensure streamlined proceedings. *Concepcion* should therefore apply with full force to the arbitration of federal and state claims alike, and should preclude both a categorical rule of decision and a case-specific determination invalidating a class action waiver.

Only Congress has the power, via a "contrary congressional command," to make the policy choice to bar or limit the application of the FAA's mandate to disputes arising under another federal statute. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The statute at issue, the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, contains no such "contrary congressional command" precluding the waiver of the right to seek a class action. Therefore, the FAA should require enforcement of the disputed class action waiver in this case.

Significantly, *Concepcion* has expressly rejected the key rationale for the Second

Circuit's decision, namely the disproportionately high cost of individualized proof when compared with the relatively small anticipated individual recovery. *Concepcion* makes clear that the concerns of the small-value plaintiff cannot defeat the class action waiver and trump the FAA's mandate.

Concepcion generally establishes that the class action waiver generally falls *outside* the scope of the FAA's saving clause, 9 U.S.C. § 2, which allows parties to challenge an arbitration agreement under generally applicable contract defenses. *Concepcion* generally immunizes the class action waiver from § 2 challenges because invalidation of the waiver, even under a generally applicable contract defense, would invariably compel class arbitration, and compelled class arbitration would contravene the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. That is, the FAA's saving clause cannot be interpreted to defeat the FAA itself.

Certiorari should also be granted to correct the Second Circuit's apparent misinterpretation of this Court's earlier precedent recognizing that a party may challenge an arbitration agreement by showing that the agreement precludes the vindication of federal statutory rights, particularly by imposing "prohibitively expensive costs" in arbitration. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000). The Second

Circuit has interpreted *Green Tree* and related precedent of this Court as having created a discretionary judicial exception to the FAA's mandate whenever a class action waiver applies to the arbitration of federal statutory claims, and the plaintiff shows that proving his or her claim on an individual basis would entail prohibitive costs. But this is precisely the argument of the small-value plaintiff that *Concepcion* expressly rejected as a basis for challenging a class action waiver and thereby defeating the FAA's mandate. And *CompuCredit* instructs that only Congress has the power to set aside the FAA's mandate in the arbitration of federal statutory claims. Congress has not done so in the Sherman Act.

The financial consequences of a class action waiver should therefore not be cognizable arbitration "costs" under *Green Tree*. Instead, that case authorizes a party to challenge the costs unique to arbitration that are wholly created by agreement and that would not exist in court, such as the payment of arbitrators' fees. *Green Tree*'s "prohibitively expensive costs" in arbitration are best understood as a particular application of this Court's "vindication" language in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), in which this Court explained that an arbitration agreement under the FAA is a kind of forum selection clause, which creates a presumptively accessible and reasonable alternative forum for the

vindication of federal statutory rights.

The "vindication" inquiry allows a party to challenge this strong federal presumption, but only by identifying unique costs or burdens under the agreement that would not exist in court and that would render arbitration an inaccessible or inadequate alternative forum for the adjudication of federal rights. *Mitsubishi* focused on the contractual terms governing the arbitral proceedings, while *Green Tree* focused instead on the cost of gaining access to arbitration under the agreement. To mount such a challenge, and remain consistent with *Concepcion* and *CompuCredit*, a party must identify terms of the arbitration agreement, *exclusive* of the class action waiver, that preclude either access to the arbitral forum or a fair opportunity to prosecute federal claims in the arbitral proceedings. Plaintiffs' challenge identifies no such terms because it focuses solely on the class action waiver and its consequences.

Plaintiffs' challenge therefore fails not only under *Concepcion* and *CompuCredit* but also under *Green Tree*. Plaintiffs do not challenge the "price of admission" to arbitration created by agreement. Instead, they argue, à la the unsuccessful plaintiffs in *Concepcion*, that, once in individual arbitration, they will be unable to afford the *inherent* costs of proving their claims because they cannot allocate them on a classwide basis. The underlying costs are

not created by agreement but instead are necessary to proving their claims and would attach equally in court.

Nor can plaintiffs argue that the allocation of those inherent costs on an individual as opposed to a classwide basis is a prohibitive cost created by agreement. The class action waiver is not so much a creature of contract as it is a salient default feature of arbitration under the FAA. *Concepcion* establishes that arbitration is presumptively, and fundamentally, a simple bilateral affair under the FAA. Parties must actually contract against this potent default term to authorize the pooling of litigation costs on a classwide basis. And, even then, *consensual* classwide arbitration, although enforceable, is nevertheless not arbitration as envisioned by the FAA and lacks its benefits. In short, any adverse financial consequences flowing from this default contract term should not be treated as "prohibitively expensive costs" of arbitration under a *Green Tree* analysis.

Finally, other courts and commentators disagree with the Second Circuit's position and embrace amicus's interpretation of the limited scope of the "vindication" inquiry and its harmonization with *Concepcion* and *CompuCredit*. This compelling split of authority with the Second Circuit's decision underscores the need for resolution of the issue by this Court to vindicate the FAA's mandate.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT, ABSENT A CONTRARY CONGRESSIONAL COMMAND, THE FEDERAL ARBITRATION ACT SHOULD REQUIRE ENFORCEMENT OF A CLASS ACTION WAIVER IN THE ARBITRATION OF FEDERAL STATUTORY CLAIMS.

This Court should grant the petition for certiorari of Petitioners American Express Company and American Express Travel Related Services Company, Inc. (collectively "American Express") to clarify the comprehensive scope of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which broadly establishes that enforcement of a class action waiver is necessary to serve "[t]he overarching purpose of the [Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"),] . . . [i.e.,] to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*, 131 S. Ct. at 1748. In this case, the Second Circuit has restricted *Concepcion* to its facts, namely the arbitration of state law claims, and, even more so, the invalidation of a categorical rule of decision hostile to class action waivers. *See In re Am. Express Merch. Litig.*, 667 F.3d 204, 213-

214, 219 (2d Cir. 2012). According to the Second Circuit, *Concepcion* applies neither to the arbitration of federal statutory claims nor to a case-specific invalidation of a class action waiver based on a facially neutral defense. *Id.*

The Second Circuit has apparently misinterpreted *Concepcion*. Contrary to the lower court's narrow reading of the decision, *Concepcion* is broadly based on the core purpose of the FAA, and that core purpose should be served wherever the FAA applies. *See Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at *11 (N.D. Cal. May 7, 2012) ("While *Concepcion* was focused on preemption analysis and whether a state could establish a rule contrary to the FAA, its statement of the meaning and purposes of the FAA applies equally in the context of determining which federal statute controls here.")

Concepcion makes clear that enforcement of a class action waiver is essential to serve the FAA's mandate of preserving party autonomy in the crafting of informal and expeditious procedures for the private resolution of *individual* disputes. *See id.*, 131 S. Ct. at 1749. Consequently, enforcement of a class action waiver is necessary to fulfill the FAA's mandate wherever that statutory mandate applies, be it to a state or federal statutory claim. *Concepcion* also defeats any substantive challenge to the waiver, be it on a

categorical or a case-by-case basis, as amicus discusses further below.[3]

Indeed, only Congress has the power to make the policy choice to bar or limit the application of the FAA's mandate to claims brought under another federal statute. As this Court recently explained, "[the FAA] requires courts to enforce agreements to arbitrate according to their terms[,] . . . even when the claims at issue are *federal statutory* claims, unless the FAA's mandate has been *overridden by a contrary congressional command.*" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added).

The applicable statute here, the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, contains no such "contrary congressional command" precluding the waiver of either a judicial forum or the right to seek a class action. *See also Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (right to seek class action is waivable procedural right unless Congress

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[3] There may be limited "procedural" challenges to a class action waiver, not raised here, that survive *Concepcion*. *See Concepcion*, 131 S. Ct. at 1750 n.6 ("Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.").

provides otherwise); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims are arbitrable). Nor do plaintiffs argue anything to the contrary. *In re Am. Express Merch. Litig.*, 667 F.3d at 213 ("Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions . . . ."). Therefore, the FAA's broad mandate, as interpreted in *Concepcion*, should apply to require enforcement of the class action waiver in American Express's arbitration agreement.

Concepcion also establishes the broad converse principle that invalidation of a class action waiver, under any circumstances, frustrates the FAA's core purpose, because invalidation invariably requires classwide arbitration as a condition of the agreement's enforceability. Compelled class arbitration, in turn, defeats the express terms of the agreement and the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. *See id.*, 131 S. Ct. at 1750. Thus, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA." *Id.* at 1748. Compelled classwide arbitration, under any circumstances, transmogrifies the arbitration process as conceived under the FAA and the parties' agreement, by imposing a

legion of intractable and distortingly burdensome procedural and legal complexities that corrupt the informality and ease of the arbitral process. The result thereby defeats both the FAA's and the parties' goal of fostering streamlined simplicity. *See id.* at 1750.

This result ensues regardless of the reasons for invalidating the class action waiver, and regardless of the statutory claims that are subject to the class action waiver. It makes no difference whether the arbitrable claim is of state or federal origin, or whether invalidation is based on a rigid, *per-se* rule (such as the *Discover Bank* rule at issue in *Concepcion*), or a case-specific determination. Regardless of the source of the underlying claim or the route taken to invalidate the class action waiver, the outcome is the same: the waiver is invalidated, class arbitration is compelled as a condition of the agreement's enforceability, and the FAA's core purpose is defeated.

Significantly, *Concepcion* has expressly rejected the key rationale for the Second Circuit's decision in this case, namely the disproportionately high cost of individualized proof when compared with the relatively small anticipated individual recovery. *Compare Concepcion*, 131 S. Ct. at 1753 (concern for "small-dollar" claims cannot trump FAA's mandate) *with In re American Exp. Merchants' Litigation*, 667 F.3d at 218 (class waiver invalidated due to "the economic [ir]rationality

of bringing an individual action against Amex in light of the[] substantial expert witness costs" and relatively small anticipated individual damages).

This Court has thus made clear that a concern for the prosecution of small-value claims cannot defeat enforcement of a class action waiver under the FAA. And yet this is precisely the basis for the Second Circuit's decision. It makes no difference under *Concepcion* whether this rejected rationale is embodied in a categorical rule of decision or is "proven" after a case-specific determination (such as the Second Circuit's purported approach in this case). The latter decision offends the FAA as much as the former, because "[t]he Plaintiffs' evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*--namely, that the class action waiver will be exculpatory, because most of these small-value claims will go . . . unprosecuted." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011).

Otherwise put, *Concepcion* establishes that the class action waiver generally falls *outside* the scope of the FAA's saving clause, contained in 9 U.S.C. § 2, which allows parties to challenge an arbitration agreement under generally applicable contract defenses. *See Concepcion*, 131 S. Ct. at 1746 ("The final

phrase of § 2 . . . permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses . . . .") (citation and internal quotations omitted).[4]

Concepcion generally immunizes the class action waiver from § 2 challenges because invalidation of the waiver, even under a generally applicable contract defense, would invariably compel class arbitration and thereby contravene both the agreement's terms and the FAA's overarching purpose of ensuring streamlined proceedings according to the parties' intent. As this Court has explained, the FAA's saving clause cannot be interpreted to defeat the FAA itself:

> Although § 2's saving clause

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[4] Section 2 of the FAA provides, in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

> preserves generally applicable contract defenses, nothing in it suggests an intent to preserve . . . rules that stand as an obstacle to the accomplishment of the FAA's objectives. . . . [A] federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, *the act cannot be held to destroy itself.*

Concepcion, 131 S. Ct. at 1748 (citations and internal quotations omitted) (emphasis added).

In sum, certiorari should be granted to clarify that *Concepcion* broadly establishes that the FAA requires enforcement of class action waivers in the arbitration of federal statutory claims where, as here, Congress has not provided any language to the contrary. Nor can the Second Circuit evade the reach of the FAA and *Concepcion* by invalidating the class waiver after engaging in a purportedly case-specific determination. Certiorari should accordingly be granted to vindicate the FAA's mandate as interpreted in *Concepcion*.

II. CERTIORARI SHOULD ALSO BE GRANTED TO CLARIFY THAT, ABSENT A CONTRARY CONGRESSIONAL COMMAND, ENFORCEMENT OF A CLASS ACTION WAIVER DOES NOT INTERFERE WITH THE VINDICATION OF FEDERAL STATUTORY RIGHTS.

Concepcion broadly establishes, then, that the FAA mandates enforcement of a class action waiver, notwithstanding the resulting cost of proving a claim on an individual basis, as opposed to a classwide basis. *Id.*, 151 S. Ct. at 1753. As amicus has discussed above, the Second Circuit apparently misinterpreted the FAA's broad mandate as explained in *Concepcion*.

But the lower court has also apparently misinterpreted earlier precedent of this Court as having created a discretionary judicial exception to the FAA's mandate whenever a class action waiver applies to the arbitration of federal statutory claims. *See In re Am. Express Merch. Litig.*, 667 F.3d at 214 (arbitration agreement enforceable "'so long as the prospective litigant may *effectively* vindicate its [federal] statutory cause of action in the arbitral forum.'") (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 632 (emphasis added by Second Circuit)). In particular, the Second Circuit has interpreted language from this

Court's decision in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000), as authorizing lower courts to override the FAA's mandate and invalidate a class action waiver based on the "prohibitively expensive costs" of proving a federal statutory claim on an individual basis, as opposed to a shared, classwide basis. *See In re Am. Express*, 667 F.3d at 210 ("[W]hen 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'") (quoting *Green Tree v. Randolph*, 531 U.S. at 92).

But this is precisely the argument of the small-value plaintiff that *Concepcion* expressly rejected as a basis for challenging a class action waiver and thereby defeating the FAA's mandate. *Concepcion*, 131 S. Ct. at 1753. Whatever "prohibitively expensive costs" of arbitration may be cognizable under *Green Tree*, the FAA precludes any consideration of the financial consequences resulting from enforcement of the class action waiver that fall on the individual claimant in arbitration. *See Concepcion*, 131 S. Ct. at 1753. And *CompuCredit* instructs that only Congress has the power to set aside the FAA's mandate in the arbitration of federal statutory claims. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 669. Congress has not exercised that power in the Sherman Act, such as by creating an

unwaivable right to a class action. In short, *Concepcion* and *CompuCredit* together should overrule the Second Circuit's interpretation of *Green Tree* as authorizing the invalidation of American Express's class action waiver in the arbitration.

The financial consequences of a class action waiver should therefore not be cognizable arbitration "costs" under a *Green Tree* analysis. What, then, are the prohibitive arbitration costs recognized in *Green Tree* as a potential basis for challenging an arbitration agreement? *Green Tree* authorizes a party to challenge the costs unique to arbitration that are wholly created by agreement and that would not exist in court, such as the payment of arbitrators' fees. After all, the disputed costs in *Green Tree* pertained solely to the contractual "price of admission" to arbitration. *See Green Tree*, 531 U.S. at 84, 91 (dismissing as "too speculative" plaintiff's challenge to potentially prohibitive arbitration costs because "the arbitration agreement was [merely] silent with respect to payment of *filing fees, arbitrators' costs, and other arbitration expenses.*") (emphasis added); *In re Am. Express Merch. Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs, C.J., dissenting from denial of rehearing *en banc*) (describing *Green Tree* costs as "price of admission" to arbitration).

Green Tree's prohibitive arbitration costs are best understood as a particular application

of this Court's "vindication" language that appeared in *Mitsubishi Motors*, 473 U.S. at 637. In that case, the Court explained that an arbitration agreement under the FAA is a kind of forum selection clause, *Id.*, 473 U.S. at 630, which creates a presumptively reasonable alternative private forum for the vindication of federal statutory rights. *See id.*, 473 U.S. at 637 ("[S]o long as the prospective litigant effectively may vindicate its [federal] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

The "vindication" inquiry apparently allows a party to challenge this strong federal presumption that arbitration is a reasonable alternative to the judicial forum for the adjudication of federal statutory rights. But, to bring such a challenge, a party would need to identify unique costs or burdens under an agreement that would not exist in court and that would render arbitration an inaccessible or inadequate alternative forum, under the particular circumstances of the case. *See Bradford v Rockwell Semiconductor Sys., Inc*, 238 F.3d 549, 556 (4th Cir. 2001) ("[T]he appropriate inquiry [under *Mitsubishi*'s "vindication" language, quoted in *Gilmer*, 500 U.S. at 28,] evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the

arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.").

Mitsubishi focused on the contractual terms governing the arbitral proceedings and discussed the availability of a treble-damages statutory remedy under the Sherman Act. *Id.*, 473 U.S. at 636-37 & n.19. *Green Tree* focused instead on the cost of gaining access to arbitration under the agreement, such as the payment of arbitrators' fees and an arbitration filing fee. *Id.*, 531 U.S. at 84, 90-91. The "vindication" inquiry can thus apply to monetary contract terms addressing the unique costs of arbitration, and it can also apply to procedural contract terms addressing the arbitration proceedings themselves.

To mount such a challenge, however, and remain consistent with *Concepcion* and *CompuCredit*, a party must identify terms of the arbitration agreement, *exclusive* of the class action waiver, that preclude either access to the arbitral forum or a fair opportunity to prosecute federal claims in the arbitral proceedings. Plaintiffs' challenge does neither of those things because it focuses solely on the class action waiver and its consequences.

Plaintiffs' challenge therefore fails not only under *Concepcion* and *CompuCredit*, as discussed above, but also under *Green Tree*. Plaintiffs do not challenge the "price of

admission" to arbitration created by agreement. Instead, they argue, à la the unsuccessful plaintiffs in *Concepcion*, that, once in arbitration, they will be unable to afford the *inherent* costs of proving their claims (particularly the payment of expert fees), because they cannot allocate them on a classwide basis. This challenge, rejected in *Concepcion*, apparently raises two related issues: the underlying costs themselves, and their allocation. Neither issue should satisfy *Green Tree*'s "prohibitive cost" inquiry.

First, the underlying costs are not created by agreement but instead are necessary to proving plaintiffs' claims and would attach equally in court. Next, plaintiffs cannot argue that the allocation of those inherent costs on an individual as opposed to a classwide basis is a prohibitive cost created by agreement. The class action waiver is not so much a creature of contract as it is a salient default feature of arbitration under the FAA. *Concepcion* establishes that arbitration is presumptively, and fundamentally, a simple bilateral affair under the FAA. *See id.*, 131 S. Ct. at 1748. Parties must actually contract against this potent default term to authorize the pooling of litigation costs on a classwide basis. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (no classwide arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so.") (emphasis in original). And, even then,

consensual classwide arbitration, although enforceable, is nevertheless "*not* arbitration as envisioned by the FAA [and] lacks its benefits . . . ." *Concepcion*, 131 S. Ct. at 1753 (emphasis added).[5]

In short, bilateral arbitration is part of the very fabric of arbitration under the FAA. Any adverse financial consequences flowing from this default contract term should not be treated as "prohibitive costs" of arbitration that are imposed by a particular agreement under a *Green Tree* analysis.

Finally, amicus wishes to point out that, in addition to the dissent below (*In re Am. Express Merch. Litig.*, 681 F.3d at 147), other courts and commentators disagree with the Second Circuit's position and embrace amicus's interpretation of the limited scope of the "vindication" inquiry and its harmonization with *Concepcion*. *See, e.g.*, *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158-59 & n.3 (9th Cir. 2012) (disagreeing with Second Circuit in this case and noting that "[w]e do not read *Concepcion* to be inconsistent with *Green Tree* and similar cases. . . . Although Plaintiffs argue that the claims at issue in this case cannot be

---

[5] As a practical matter, neither *Concepcion* nor *Stolt-Nielsen* should preclude similarly situated parties who are subject to a class action waiver from discussing their claims with one another, or from pooling their resources to hire a lawyer or fund expert fees, so long as they proceeded individually in the arbitration of their claims.

vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that premise."); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp.2d 1042, 1050 (N.D. Cal. 2011) ("If *Green Tree* has any continuing applicability [after *Concepcion*], it must be confined to circumstances in which a plaintiff argues that *costs specific to the arbitration process*, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. . . . *Concepcion forecloses plaintiffs from objecting to class-action waivers* in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.") (emphasis added); *Bradford v Rockwell Semiconductor Sys.*, 238 F.3d at 556 (discussing "vindication" inquiry as a case-by-case analysis focusing on unique costs of gaining access to arbitration under particular agreement); Jacob Spencer, Note, *Arbitration, Class Action Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1012 (2012) ("*Green Tree* might not apply where the 'prohibitively expensive' costs are imposed, not by arbitration-specific expenses, but by the claim itself."). This compelling split of authority with the Second Circuit's decision underscores the need for resolution of the issue by this Court to vindicate the FAA's mandate.

In sum, certiorari should be granted to correct the Second Circuit's misinterpretation of this Court's "vindication" precedent as

authorizing courts to override the FAA when a class action waiver applies to federal statutory claims. To the contrary, *Concepcion* and *CompuCredit* should overrule the Second Circuit's decision and preclude a challenge to the class action waiver under an analysis derived from *Green Tree*. Consistent with *CompuCredit* and *Concepcion*, and with *Green Tree* itself, a "vindication" challenge should be limited to the unique costs of arbitration that are imposed by agreement and would not exist in court. Only such an interpretation would honor the FAA's mandate and preserve the strong federal presumption that an arbitration agreement creates a reasonable alternative forum for the adjudication of federal statutory claims.

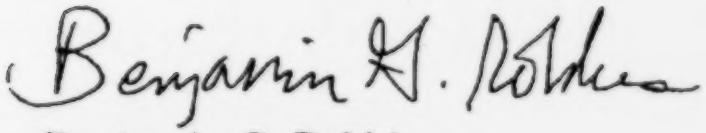
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant Petitioner American Express's petition for a writ of certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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August 28, 2012

JOINT APPENDIX

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC 21 2012
OFFICE OF THE CLERK

No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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December 21, 2012

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 30, 2012
CERTIORARI GRANTED: NOVEMBER 9, 2012

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United States District Court for the Southern District of New York, *DRF Jeweler Corp., et al. v. American Express Co., et al.*, No. 1:03-cv-09517-GBD 8

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United States District Court for the Southern District of New York, *Mascari Enters. v. American Express Co., et al.*, No. 1:04-cv-00366-GBD 31

United States District Court for the Southern District of New York, *Mims Enters., Inc. v. American Express Co., et al.*, No. 1:04-cv-01558-GBD 34

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix but may be found in the appendix to the petition for a writ of certiorari in this case:

Opinion of the United States Court of Appeals for the Second Circuit, *In re American Express Merchants' Litig.*, No. 06-1871-cv (Feb. 1, 2012)..... 1a

Opinion of the United States Court of Appeals for the Second Circuit, *In re American Express Merchants' Litig.*, No. 06-1871-cv (Mar. 8, 2011).... 31a

Opinion of the United States Court of Appeals for the Second Circuit, *In re American Express Merchants' Litig.*, No. 06-1871-cv (Jan. 30, 2009).... 57a

Memorandum Opinion and Order of the United States District Court for the Southern District of New York, *In re American Express Merchants' Litig.*, No. 03 CV 9592 (GBD) (Mar. 16, 2006)..... 100a

Statement of the United States Court of Appeals for the Second Circuit *Sua Sponte* Considering Rehearing, *In re American Express Merchants' Litig.*, No. 06-1871-cv (Aug. 1, 2011).. 125a

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing En Banc, *In re American Express Merchants' Litig.*, No. 06-1871-cv (May 29, 2012)..... 127a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 3:03-cv-03719-SI

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS,
Plaintiff,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
8/8/03	1	[CLASS ACTION] COMPLAINT & *Demand for Jury Trial – [Summons Issued]* against American Express Travel Related Services Company, Inc. & American Express Company, [Filing Fee: $150.00, receipt number 3350417]. Filed by Plaintiff Italian Colors Restaurant. (tn) Additional attachment(s) added on 8/21/2003 (tn, COURT STAFF). (Entered: 8/11/2003)
		* * * * *
9/5/03	17	MOTION to Appoint Lead Plaintiff and Lead Counsel *(Notice of Motion)*

filed by Italian Colors Restaurant. Motion Hearing set for 10/14/2003 09:00 AM. (Eng, Kevin) (Entered: 09/05/2003)

9/5/03 18 MEMORANDUM of points & authorities in support of Plaintiff's Motion to consolidate, appoint lead counsel & grant other relief.....>>>MOTION to Appoint Lead Plaintiff and Lead Counsel *(Memorandum In support)* Filed by Plaintiff Italian Colors Restaurant. Motion Hearing set for 10/14/2003 09:00 AM. (Eng, Kevin) .....>>>Modified on 9/9/2003. (tn, COURT STAFF). (Entered: 9/5/2003)

9/5/03 19 DECLARATION in Support re 17, 18 *Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Related document(s) 17, 18) (Eng, Kevin) (Entered: 9/5/2003)

9/5/03 20 DECLARATION in Support re 17, 18 *Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Attachments: #1 Exhibit Exhibits To Declaration of Read McCaffrey)(Related document(s) 17, 18) (Eng, Kevin) (Entered: 09/05/2003)

9/5/03 21 DECLARATION in Support re 17, 18 *Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Related

document(s) 17, 18) (Eng, Kevin) (Entered: 09/05/2003)

9/5/03 22 [Proposed Order No.1] .....>>> MOTION to Appoint Lead Plaintiff and Lead Counsel *(Proposed Order)* Filed by Italian Colors Restaurant. Motion Hearing set for 10/14/2003 09:00 AM. (Eng, Kevin)... Modified on 9/9/2003 (tn, COURT STAFF). (Entered: 09/05/2003)

* * * * *

9/18/03 30 MOTION to Appoint Lead Plaintiff and Lead Counsel *(Amended Notice of Motion)* filed by Italian Colors Restaurant. Motion Hearing set for 11/7/2003 09:00 AM. (Attachments: #1 Proposed Order #2 Proof of Service) (Eng, Kevin) (Entered: 9/18/2003)

* * * * *

10/3/03 35 MOTION to Transfer Case filed by American Express Company, American Express Travel Related Services Company, Inc. Motion Hearing set for 11/7/2003 09:00 AM. (Attachments: #1 Declaration of Bruce H. Schneider #2 Declaration of Amy Alterman #3 Proposed Order re Defs' Motion to Transfer Venue) (Newman, Stephen) (Entered: 10/03/2003)

10/16/03 36 Memorandum in Opposition re 22, 17, 18, 30 *Plaintiff's Motion to Consolidate, Appoint Lead Counsel and*

Grant Other Relief, filed by American Express Company, American Express Travel Related Services Company, Inc. (Newman, Stephen) (Entered: 10/16/2003)

10/17/03 37 Memorandum in Opposition re 35 filed by Italian Colors Restaurant. (Eng, Kevin) (Entered: 10/17/2003)

10/17/03 38 DECLARATION of Edward Zusman in Opposition to 35 filed by Italian Colors Restaurant. (Attachments: #1 Exhibit) (Related document(s) 35) (Eng, Kevin) (Entered: 10/17/2003)

10/24/03 39 Reply Memorandum to Motion re 17 *In Further Support of Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Eng, Kevin) (Entered: 10/24/2003)

10/24/03 40 Declaration of Edward S. Zusman in Support of 39 *In Further Support Motion To Consolidate, Appoint Lead Counsel, Grant Other Relief* filed by Italian Colors Restaurant. (Attachments: #1 Exhibit) (Related document(s) 39) (Eng, Kevin) (Entered: 10/24/2003)

10/24/03 41 Reply Memorandum to Motion re 35 *to Transfer Case* filed by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: #1 Supplemental Declaration of Bruce H. Schneider in

		Support Thereof) (Newman, Stephen) (Entered: 10/24/2003)
		* * * * *
11/10/03	46	ORDER by Judge Illston denying 30 Motion to Appoint Lead Plaintiff and Lead Counsel, granting 35 Motion to Transfer Case, denying 17 Motion to Appoint Lead Plaintiff and Lead Counsel, denying 18 Motion to Appoint Lead Plaintiff and Lead Counsel (ts, COURT STAFF) (Entered: 11/10/2003)
		* * * * *
11/18/03		Certified copy of docket entries, certified copy of transferral order and original case file documents mailed to USDC for Southern District of New York via US Certified mail. (ys, COURT STAFF) (Entered: 11/12/2003)
		* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 3:03-cv-04768-SI

COHEN RESE GALLERY, INC., IL FORNO, INC., AND MAI JASMINE CORP., ON BEHALF OF THEMSELVES AND ALL SIMILARLY SITUATED PERSONS,
Plaintiffs,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
10/23/03	1	COMPLAINT; *DEMAND FOR JURY TRIAL* against American Express Company, American Express Travel Related Services Company, Inc. (Filing fee $150.00 receipt number 3352845). Filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (gba, COURT STAFF) Additional attachment(s) added on 11/3/2003 (gba, COURT STAFF). (Entered: 10/27/2003)

* * * * *

11/17/03	8	AMENDED COMPLAINT against all defendants. Filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (Entered: 11/17/2003)

* * * * *

11/24/03	12	MOTION to Transfer Case filed by American Express Company, American Express Travel Related Services Company, Inc. Motion Hearing set for 1/9/2004 09:00 AM. (Attachments: #1 Declaration of Bruce H. Schneider and Amy Alterman in Support Thereof (Volume 1 of 3) #2 (Volume 2 of 3) #3 (Volume 3 of 3) #4 Proposed Order) (Newman, Stephen) (Filed on 11/24/2003) (Entered: 11/24/2003)

* * * * *

12/9/03	15	STIPULATION *and [Proposed] Order Granting Defendants' Motion to Transfer Venue to the Southern District of New York (re 12) submitted* by American Express Company, American Express Travel Related Services Company, Inc. (Newman, Stephen) (Filed on 12/9/2003) (Entered: 12/09/2003)

* * * * *

12/17/03	17	ORDER tranferring case. Signed by Judge Illston on 12/16/03. (ts, COURT STAFF) (Filed on 12/17/2003) (Entered: 12/17/2003)

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:03-cv-09517-GBD

DRF JEWELER CORP., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND MIMS ENTERPRISES, INC.,
Plaintiffs,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
12/1/03	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee $ 150.00, Receipt Number 492383) Document filed by DRF Jeweler Corp. (gf,) Modified on 12/4/2003 (gf,). (Entered: 12/02/2003)
		* * * * *
1/16/04	7	MOTION for an order for appointment of lead counsel and for consolidation of cases 03cv9517, 03cv9592 and 04-266. Proposed order attached. Document filed by DRF Jeweler Corp.

(dle,) Modified on 1/27/2004 (dle,). (Entered: 01/27/2004)

1/16/04	8	MEMORANDUM OF LAW in Support re: 7 MOTION to Consolidate Cases. Document filed by DRF Jeweler Corp. (dle,) (Entered: 01/27/2004)
1/16/04	9	DECLARATION of Mark Reinhardt. Document filed by DRF Jeweler Corp. (dle,) (Entered: 01/27/2004)

* * * * *

3/12/04	12	MEMORANDUM OF LAW in Support re: 7 MOTION to Consolidate Cases *and to Appoint Co-Lead Counsel*. Document filed by Mims Enterprises, Inc. (Trinko, Curtis) (Entered: 03/12/2004)
3/12/04	13	MEMORANDUM OF LAW in Support of 7 MOTION to Consolidate Cases. Document filed by Mims Enterprises, Inc. (sb,) (Entered: 03/17/2004)

* * * * *

4/30/04		MOTION for an Order Dismissing these actions against American Express in favor of arbitration, MOTION for an Order dismissing the claims of plaintiff National Supermarkets Association with prejudice, MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc.

Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)

* * * * *

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B. Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

* * * * *

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all

claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:03-cv-09592-GBD

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Plaintiffs,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
12/3/03		CASE TRANSFERRED IN from the United States District Court – Northern District of California; Case Number: 3:03-cv-3719 (SI). Original file with documents numbered 1, 2, 4-7, 25, 26, 42, 43, 46, certified copy of transfer order and docket entries received. Document filed by American Express Company, American Express Travel Related Services Company, Inc. (gf,) (Entered: 12/08/2003)

* * * * *

12/24/03	3	AMENDED COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (jco,) (Entered: 01/05/2004)
12/29/03	5	MOTION to Approve appointment of lead counsel and MOTION to Consolidate Cases related proceedings. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. Return Date set for 1/30/2004 02:30 PM before Judge Richard Owen. Return Date set for 1/30/2004 02:30 PM before Judge Richard Owen. (db,) (Entered: 01/14/2004)
12/29/03	6	MEMORANDUM OF LAW in Support re: 5 MOTION to Approve appointment of lead counsel. MOTION to Consolidate Cases of related proceedings. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (db,) (Entered: 01/14/2004)
12/29/03	7	DECLARATION of Read K. McCaffrey in Support re: 5 MOTION to Approve appointment of lead counsel.

		MOTION to Consolidate Cases. MOTION to Consolidate Cases. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (db,) (Entered: 01/14/2004)
		* * * * *
1/16/04		MOTION for an order for appointment of lead counsel and for consolidation of 03cv9517, 03cv9592 and 04cv266. Document filed by DRG Jeweler Corp. Original document filed in case #03cv9517, document #7. (dle,) (Entered: 01/27/2004)
1/16/04		MEMORANDUM OF LAW in Support re: MOTION to Consolidate Cases. Document filed by DRF Jeweler Corp. Original document filed in case #03cv9517, document #8. (dle,) (Entered: 01/27/2004)
1/16/04	10	MEMORANDUM OF LAW in Opposition re: 5 MOTION to Approve appointment of lead counsel. MOTION to Consolidate Cases. MOTION to Approve appointment of lead counsel. Document filed by DRF Jeweler Corp. (dle,) (Entered: 01/27/2004)
		* * * * *
3/12/04		MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises,

Inc.'s. Original document #13 filed in 03-cv-9517. (sb,) (Entered: 03/17/2004)

* * * * *

4/30/04 20 MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. (yv,) (Entered: 05/04/2004)

4/30/04 21 MEMORANDUM OF LAW in Support re: 20 MOTION to Dismiss. MOTION to Stay. MOTION to Dismiss. MOTION to Stay. MOTION to Dismiss. MOTION to Stay. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:03 p.m. (yv,) (Entered: 05/04/2004)

* * * * *

6/21/04 24 MEMORANDUM OF LAW in Opposition re: 20 Motion to Compel Arbitration Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian

Colors Restaurant, National Supermarkets Association, Phoung Corp. (tp,) (Entered: 06/23/2004)

* * * * *

12/8/04 26 MEMORANDUM OF LAW in Opposition to motion to compel arbitration. Document filed by Bunda Starr Corp, 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Phoung Corp. (jp,) (Entered: 12/15/2004)

* * * * *

12/14/04 28 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pretrial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. (Signed by Judge George B. Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

* * * * *

12/23/04 30 DEFENDANTS' SUPPLEMENTARY MEMORANDUM OF LAW. Document filed by American Express Company. (jmi,) (Entered: 12/28/2004)

* * * * *

4/22/05 32 MEMORANDUM OF LAW in Opposition re: 20 MOTION to Dismiss the Complaint in favor of arbitration... MOTION to Stay the proceedings... Document filed by National Supermarkets Association, 492 Supermarket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. (mde,) (Entered: 04/29/2005)

* * * * *

3/16/06 34 MEMORANDUM AND OPINION that American Express' motion to compel arbitration of all claims against it is granted. Since this court finds that all of plaintiffs' claims against American Express are subject to arbitration it further orders that plaintiffs' cases against American Express be dismissed. American Express' motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied. The bank dfts' motion to dismiss the claims in National Supermarket is denied. The bank dfts' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted. The

Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Signed by Judge George B. Daniels on 3/15/06) (dle,) (Entered: 03/16/2006)

* * * * *

3/16/06 35 MEMORANDUM AND OPINION & ORDER #92862 that American Express's motion to compel arbitration of all claims is granted. Since this Court finds that all of plntfs' claims against American Express are subject to arbitration, it further orders that plntfs' cases against American Express be dismissed. American Express's motion to intervene and to dismiss the claims of plntfs against the banks in National Supermarket is denied. The bank defts' motion to dismiss the claims in National Supermarket is denied. The bank defts' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express, is granted. The Cohen Rese plntfs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Signed by Judge George B. Daniels on 3/15/06) (cd,) (Entered: 03/16/2006)

3/20/06 36 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated

March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

* * * * *

3/30/06	37	MOTION to Alter Judgment re: 36 Clerk's Judgment. Document filed by DRF Jeweler Corp., National Supermarkets Association, 492 Supermarket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. (cd,) (Entered: 03/31/2006)
3/30/06	38	MEMORANDUM OF LAW in Support re: 37 MOTION to Alter Judgment re: 36 Clerk's Judgment. Document filed by DRF Jeweler Corp., National Supermarkets Association, 492 Supermar-

ket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. (cd,) (Entered: 03/31/2006)

* * * * *

4/12/06 39 MEMORANDUM OF LAW in Opposition re: 37 MOTION to Alter Judgment re: 36 Clerk's Judgment. Document filed by American Express Company. (djc,) (Entered: 04/13/2006)

* * * * *

4/18/06 40 NOTICE OF APPEAL from 36 Clerk's Judgment, 35 Memorandum & Opinion. Document filed by DRF Jeweler Corp., National Supermarkets Association, 492 Supermarket Corp, Bunda Starr Corp, Phoung Corp, Italian Colors Restaurant. Filing fee $455.00, receipt number E 576295. Copies of Notice of Appeal mailed to Attorney(s) of Record: Stroock & Stroock & Lavan, L.L.P., Wilson Sonsini Goodrich & Rosati LLP, Cravatj Swaine & Moore LLP, Morrison & Foerster LLP, and Sidley Austin LLP. (nd,) (Entered: 04/18/2006)

* * * * *

6/12/06 41 ORDER, plaintiffs motion for reconsideration is denied. Plaintiffs alternative request for clarification for the benefit of the arbitrator is also denied. So Ordered. (Signed by Judge George B. Daniels on 9/12/2006) (jmi,) (Entered: 06/12/2006)

8/23/06	42	Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for 40 Notice of Appeal, filed by DRF Jeweler Corp., Italian Colors Restaurant, Phoung Corp, Bunda Starr Corp, 492 Supermarket Corp, National Supermarkets Association, USCA Case Number 06-1871-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (nd,) Additional attachment(s) added on 8/30/2006 (dt,). (Entered: 08/23/2006)

* * * * *

2/1/12	50	TRUE COPY OPINION of USCA as to 40 Notice of Appeal, filed by 492 Supermarket Corp, Italian Colors Restaurant, National Supermarkets Association, Bunda Starr Corp, Phoung Corp, DRF Jeweler Corp. USCA Case Number 06-1871-cv. For the reasons given above, the decision of the District Court is reversed. We remand to the District Court for further proceedings consistent with this opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 02/01/2012. (nd) (Entered: 02/01/2012)

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:03-cv-10271-GBD

COHEN RESE GALLERY, INC., IL FORNO, INC., AND MAI JASMINE CORP., ON BEHALF OF THEMSELVES AND ALL SIMILARLY SITUATED PERSONS,
Plaintiffs,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
12/30/03		CASE TRANSFERRED IN from the United States District Court – Northern District of California; Case Number: 3:03-cv-4768 (SI). Original file with documents numbered 1, 2, 9, 17, certified copy of transfer order and docket entries received. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (dle,) (Entered: 01/06/2004)
		* * * * *
2/6/04	3	MOTION for Partial Summary Judgment, directing judgment in favor of

plaintiffs on the fifth claim for relief stated in their amended class action complaint. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (sb,) (Entered: 02/11/2004)

2/6/04 4 MEMORANDUM OF LAW in Support of 3 MOTION for Partial Summary Judgment. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (sb,) (Entered: 02/11/2004)

2/6/04 5 DECLARATION of Gary B. Friedman in Support of 3 MOTION for Summary Judgment. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (sb,) (Entered: 02/11/2004)

* * * * *

3/12/04 MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises, Inc.'s. Original document #13 filed in 03-cv-9517. (sb,) (Entered: 03/17/2004)

* * * * *

4/30/04 MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations

of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)

4/30/04 9 MEMORANDUM OF LAW in Opposition re: 3 MOTION for Summary Judgment. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:03 p.m. (yv,) (Entered: 05/04/2004)

4/30/04 10 COUNTER STATEMENT TO 2 Rule 56.1 Statement. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. (yv,) (Entered: 05/04/2004)

4/30/04 11 DECLARATION of Bruce H. Schneider in Support re: 9 Memorandum of Law in Opposition to Motion. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. (yv,) (Entered: 05/04/2004)

* * * * *

6/21/04	12	REPLY MEMORANDUM OF LAW in Support re: 3 MOTION for Summary Judgment. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corporation. (db,) (Entered: 06/24/2004)
6/21/04	13	PLAINTIFFS' APPENDIX of Declarations and Exhibits in Opposition to Motion to Compel Arbitration. Document filed by Cohen Rese Gallery, Inc., IL Forno, Inc., Mai Jasmine Corp., Inc. (db,) (Entered: 06/24/2004)

* * * * *

12/14/04		ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pretrial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B.

Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

* * * * *

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:04-cv-00266-GBD

CHEZ NOELLE RESTAURANT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
1/14/04	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee $150.00, Receipt Number 496442) Document filed by Chez Noelle Restaurant. (gf,) (Entered: 01/16/2004)
		* * * * *
1/16/04		MOTION for an order for appointment of lead counsel and for consolidation of 03cv9517, 03cv9592 and 04cv266. Original document filed in case #03cv9517, document #7. Docu-

ment filed by DRF Jeweler Corp. (dle,) (Entered: 01/27/2004)

1/16/04 MEMORANDUM OF LAW in Support re: MOTION to Consolidate Cases. Original document filed by DRF Jeweler Corp. Original document filed in case #03cv9517 document #8. (dle,) (Entered: 01/27/2004)

* * * * *

3/12/04 MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises, Inc.'s. Original document #13 filed in 03-cv-9517. (sb,) (Entered: 03/17/2004)

4/30/04 MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order Dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)

* * * * *

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pre-trial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B. Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

* * * * *

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the

bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:04-cv-00366-GBD

MASCARI ENTERPRISES D/B/A SOUND STATIONS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
1/16/04	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee $150.00, Receipt Number 496681) Document filed by Mascari Enterprises. (gf,) (Entered: 01/20/2004)
		* * * * *
4/30/04		MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order Dismissing the claims of plaintiff National Supermarkets

Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original entry in 03cv9592 document number 20. (yv,) (Entered: 05/04/2004)

* * * * *

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pretrial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B.

Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

* * * * *

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:04-cv-01558-GBD

MIMS ENTERPRISES, INC. D/B/A MIMS RESTAURANT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
		* * * * *
2/24/04	1	COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc. (Filing Fee $150.00, Receipt Number 500610) Document filed by Mims Enterprises, Inc. (gmo,) (Entered: 02/25/2004)
		* * * * *
3/12/04		MEMORANDUM OF LAW in Support of MOTION to Consolidate Cases. Document filed by Mims Enterprises,

Inc.'s. Original document #13 filed in 03-cv-9517. (sb,) (Entered: 03/17/2004)

4/30/04 MOTION for an Order Dismissing these actions against American Express in favor of arbitration. MOTION for an Order Dismissing the claims of plaintiff National Supermarkets Association with prejudice. MOTION for an Order Staying these proceedings pending arbitration. Declarations of Cathryn A. Snyder and Donald Blumenthal in support attached. Document filed by American Express Company, American Express Travel Related Services Company, Inc. Received in night deposit box on 4/30/04 at 5:02 p.m. Original document filed in case no. 03cv9592, doc. #20. (kkc,) (Entered: 05/04/2004)

* * * * *

12/14/04 ORDER: that cases 03cv10271, 03cv9517, 04cv266, 04cv366 and 04cv1558 are hereby consolidated as Member cases in Lead case 03cv9592 for all proceedings before this Court (case 04cv5432 shall not be included in this consolidation). All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into 03cv9592 for pretrial purposes. This Order shall apply to every such related action, absent order of the Court. Every pleading filed in the consolidated action shall bear the following caption: In re

AMERICAN EXPRESS MERCHANTS' LITIGATION (Master File No: 03civ.9592 (GBD)) as further set forth in said Order. Original document filed in Lead case 03cv9592 (GBD), document #28. (Signed by Judge George B. Daniels on 12/10/04) (db,) (Entered: 12/24/2004)

* * * * *

3/20/06 CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum Opinion and Order dated March 15, 2006, American Express's motion to compel arbitration of all claims against it is granted; plaintiffs' cases against American Express is dismissed; American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in National Supermarket is denied; the bank defendants' motion to dismiss the claims in National Supermarket is denied; the bank defendants' motion to stay the action in National Supermarket pending the arbitration of related claims against American Express is granted; and the Cohen Rese plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice. (Orig. filed in case no. 03 Civ. 9592 (GBD) as doc. #36). (Signed by J. Michael McMahon, clerk on 3/20/06) (ml,) (Entered: 03/20/2006)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
Plaintiffs-Appellants,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
Defendants-Appellees.

DATE	DOCKET ENTRY
4/18/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, filed. [Entry date Apr 26 2006] [JP]
	* * * * *
9/11/06	APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Res-

taurant, National Supermarkets Association, ET AL, brief FILED with proof of service. [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, joint appendix filed w/pfs. [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, Joint Appendix filed w/pfs. (volume #2) [Entry date Oct 3 2006] [JP]

9/11/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, special appendix filed (w/pfs) [Entry date Oct 3 2006] [JP]

* * * * *

9/18/06 AMICUS CURIAE American Antitrust Institute, brief filed with proof of service. [Entry date Oct 11 2006] [JP]

9/20/06 AMICUS CURIAE Trial Lawyers for Public Justice, brief filed with proof of service. [Entry date Oct 11 2006] [JP]

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11/1/06 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., brief filed with proof of service. [Entry date Nov 8 2006] [JP]

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11/13/06 Movants Hayward D. Fisk and Robert Lonergan, et al, brief received. (Motion Pending) [Entry date Nov 15 2006] [JP]

* * * * *

11/14/06 AMICUS CURIAE Business Roundtable, brief filed with proof of service. [Entry date Nov 15 2006] [JP]

* * * * *

11/17/06 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, reply brief filed with proof of service. [Entry date Nov 28 2006] [JP]

* * * * *

9/13/07 Amicus Curiae Hayward D. Fisk, et al brief filed with proof of service. [Entry date Sep 24 2007] [AV]

9/13/07 Order FILED GRANTING motion to file brief as amicus curiae by Movant Hayward Fisk, Movant Robert Lonergan, Movant Clifford Storms, Movant Earnest Patrikis, Movant William Lytton, endorsed on motion dated 11/13/2006. [Entry date Sep 24 2007] [AV]

* * * * *

11/16/07 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Nov 19 2007] [LY]

11/29/07	APPELLEES American Express Company and American Express Travel Related Services Company, Inc., 28(J) letter received. [Entry date Nov 29 2007] [TM]
12/4/07	APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Dec 5 2007] [LY]
12/10/07	Case heard before POOLER, SACK, SOTOMAYOR, C.JJ CD DATE: 12/10/07 [Entry date Dec 10 2007] [RD]
	* * * * *
12/26/07	APPELLEE American Express Company, American Express Travel Related Services Company, Inc., 28(J) letter FILED. [Entry date Dec 26 2007] [LY]
	* * * * *
1/3/08	APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Jan 4 2008] [LY]
	* * * * *
3/11/08	APPELLEE American Express Company, American Express Travel Related Services Company, Inc., 28(J) letter received. [Entry date Mar 11 2008] [YS]
	* * * * *
5/1/08	APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Res-

taurant, National Supermarkets Association, ET AL, 28(J) letter received. [Entry date May 1 2008] [YS]

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5/2/08 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., 28(J) letter received in response to the Appellants 28(j) letter. [Entry date May 5 2008] [EM]

11/12/08 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter dated 11/10/08 received. [Entry date Nov 13 2008] [EM]

11/12/08 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., response to the 28(J) letter of the Appellant, received. [Entry date Nov 13 2008] [EM]

1/30/09 Judgment of the district court is REVERSED and REMANDED by published signed opinion filed. (RSP) [Entry date Jan 30 2009] [AM]

1/30/09 Judgment filed. [Entry date Jan 30 2009] [AM]

* * * * *

2/20/09 Judgment MANDATE ISSUED. CLOSED [Entry date Feb 20 2009] [HT]

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6/5/09	Notice of filing petition for APPELLEE American Express Company, American Express Travel Related Services Company, Inc., dated May 29, 2009, filed. Supreme Court #: 08-1473. [Entry date Jun 5 2009] [DB]
5/7/10	Writ of Certiorari GRANTED [Entry date May 12 2010] [AS]
6/18/10	Supreme Court judgment and costs filed. [Entry date Jun 21 2010] [AS]
7/30/10	REINSTATEMENT, pursuant to Supreme Court of the United States judgment dated 06/04/2010 and this court's order dated 07/30/2010, FILED. Reinstatement Code: M. [Entry date Jul 30 2010] [AG]
7/30/10	ORDER, each party shall submit a written brief limited to the issue of how Stolt-Nielsen applies to this case, no later than 08/23/2010 and reply briefs no later than 09/08/2010, by RDS, RSP, FILED. [Entry date Jul 30 2010] [AG]

* * * * *

8/23/10	SUPPLEMENTAL BRIEF, on behalf of APPELLANTS Italian Colors Restaurant, 492 Supermarket Corp., National Supermarkets Association, ET AL., FILED. [Entry date Aug 24 2010] [DB]
8/24/10	SUPPLEMENTAL BRIEF, on behalf of APPELLEE American Express Company, American Express Travel Related Services Company, Inc., FILED. [Entry date Aug 24 2010] [DB]

9/8/10	SUPPLEMENTAL REPLY BRIEF, on behalf of APPELLEES American Express Company and American Express Travel Related Services Company, Inc., FILED. [Entry date Sep 8 2010] [DB]
9/8/10	SUPPLEMENTAL REPLY BRIEF, on behalf of APPELLANTS Italian Colors Restaurant, 492 Supermarket Corp, Bunda Starr Corp, National Supermarkets Association, ET AL., FILED. [Entry date Sep 8 2010] [DB]
9/8/10	Case submitted before POOLER, SACK, C.JJ. [Entry date Mar 7 2011] [MR]
3/8/11	OPINION, district court judgment reversed and remanded, FILED (RSP). [Entry date Mar 8 2011] [CM]

* * * * *

3/8/11	Judgment filed. [Entry date Mar 10 2011] [CM]
3/9/11	APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, 28(J) letter FILED. [Entry date Mar 16 2011] [CM]

* * * * *

3/28/11	MOTION, to stay the mandate, on behalf of Appellee American Express Travel Related Services Company, Inc., Appellee American Express Company FILED. [Entry date Mar 29 2011] [CM]

4/4/11	OPPOSITION PAPERS, on behalf of Appellant Italian Colors Restaurant et al FILED. [Entry date Apr 5 2011] [CM]

* * * * *

4/11/11	RESPONSE PAPERS, to the opposition of motion to stay mandate on behalf of Appellee American Express Company, American Express Travel Related Services Company, Inc., RECEIVED. [Entry date Apr 12 2011] [CM]
4/11/11	ORDER, Appellant Italian Colors Restaurant, Appellant National Supermarkets Association, Appellant 492 Supermarket Corp, Appellant Bunda Starr Corp, Appellant Phoung Corp, Appellee American Express Company, Appellee American Express Travel Related Services Company, Inc.'s motion to stay the mandate granted, FILED. [Entry date Apr 11 2011] [CM]
5/9/11	ORDER, dated 05/09/2011, it is hereby Ordered that each party shall submit a letter brief, not to exceed ten (10) double-spaced pages, limited to the issue of how Concepcion applies to this case. Parties shall submit their briefs concurrently no later than June 3, 2011, FILED. (RSP, RDS). [Entry date May 9 2011] [CM]

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5/31/11	Notice from Supreme Court granting APPELLEE American Express Company, American Express Travel Related

Services Company, Inc., extension of time in which to file a writ of certiorari. [Entry date Jun 1 2011] [CM]

6/3/11 APPELLANT 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Supermarkets Association, ET AL, LETTER BRIEF filed with proof of service. [Entry date Jun 6 2011] [CM]

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6/6/11 APPELLEE American Express Company, American Express Travel Related Services Company, Inc., LETTER BRIEF filed with proof of service. [Entry date Jun 6 2011] [CM]

6/13/11 LETTER, dated 06/13/2011, on behalf of Appelllee American Express RECEIVED. [Entry date Jun 14 2011] [CM]

8/1/11 ORDER, dated 08/01/2011, In light of the Supreme Court's decision of April 27, 2011 in AT&T Mobility LLC v. Conception, — U.S. —, 2011 WL 1561956 (2011), this panel is sua sponte considering rehearing, No additional briefing is necessary at this time, FILED (RSP, RDS). [Entry date Aug 1 2011] [CM]

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11/30/11 FRAP 28(J) LETTER, dated 11/29/2011, on behalf of Appellants 492 Supermarket Corp, Bunda Starr Corp, Italian Colors Restaurant, National Super-

markets Association, et al, RECEIVED. [Entry date Nov 30 2011] [CM]

12/1/11 LETTER, dated 11/30/201, in response to plaintiffs' Rule 28(j) letter, on behalf of Appellee American Express RECEIVED. [Entry date Dec 1 2011] [CM]

1/18/12 28(J) letter on behalf of Plaintiffs-Appellants RECEIVED. [Entry date Jan 19 2012] [CM]

1/24/12 LETTER, dated 01/23/2012, in response to Plaintiffs-Appellant's Rule 28(J) letter RECEIVED. [Entry date Jan 24 2012] [CM]

2/1/12 PETITION OPINION, the decision of the district court is reversed and remanded, by RSP, RDS, FILED. [Entry date Feb 1 2012] [CM]

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2/14/12 PETITION FOR REHEARING EN BANC on behalf of Appellee American Express Travel Related Services Company, Inc., Appellee American Express Company motion petition for rehearing en banc FILED. [Entry date Feb 16 2012] [CM]

2/15/12 AMICUS CURIAE The Chamber of Commerce of the U.S.A. RECEIVED. [Entry date Feb 16 2012] [CM]

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3/6/12 Amicus Curie Brief on behalf of Chamber of Commerce of the United States of

America, FILED. [Entry date Mar 6 2012] [CM]

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3/19/12 28(J) letter on behalf of Appellees American Express Company, American Express Travel Related Services Company, Inc., RECEIVED. [Entry date Mar 19 2012] [CM]

3/30/12 28(J) letter on behalf of Appellee American Express Company, RECEIVED. [Entry date Apr 4 2012] [CM]

5/29/12 Non-dispositive concurring opinion filed. [Entry date May 29 2012] [CM]

5/29/12 Non-dispositive dissenting opinion filed. [Entry date May 29 2012] [CM]

5/29/12 Non-dispositive dissenting opinion filed. [Entry date May 29 2012] [CM]

5/29/12 Non-dispositive dissenting opinion filed. [Entry date May 29 2012] [CM]

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5/29/12 ORDER, petition en banc denied, FILED. [Entry date May 29 2012] [CM]

6/1/12 MOTION, to stay the mandate, on behalf of Appellee American Express Travel Related Services Company, Inc., Appellee American Express Company FILED. [Entry date Jun 5 2012] [CM]

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6/11/12 MOTION ORDER, granting motion stay the mandate filed by Appellee American Express Company, Appellee American

	Express Travel Related Services Company, Inc., by RSP, RDS, FILED. [Entry date Jun 11 2012] [CM]
8/1/12	U.S. SUPREME COURT NOTICE of writ of certiorari filing dated 07/30/2012, U.S. Supreme Court docket #12-133, RECEIVED. [Entry date Aug 1 2012] [CM]

SUPREME COURT OF THE UNITED STATES

No. 08-1473

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ET AL.,
Respondents.

DATE	PROCEEDINGS AND ORDERS
	* * * * *
May 29 2009	Petition for a writ of certiorari filed. (Response due June 29, 2009)
	* * * * *
Jun 18 2009	Order extending time to file response to petition to and including July 21, 2009.
Jun 26 2009	Brief amici curiae of American Bankers Association, et al. filed.
Jun 29 2009	Brief amicus curiae of Business Roundtable filed.
Jun 29 2009	Brief amici curiae of Verizon Communications Inc., et al. filed.
Jul 21 2009	Brief of respondents Italian Colors Restaurant, et al. in opposition filed.
	* * * * *

Aug 5 2009	Reply of petitioners American Express Company, et al. filed. (Distributed)

* * * * *

May 3 2010	Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. ___ (2010). Justice Sotomayor took no part in the consideration or decision of this petition.
Jun 4 2010	JUDGMENT ISSUED.

[Attorney Names/Addresses Omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ITALIAN COLORS RESTAURANT, PHUONG CORP., BUNDA STARR CORP., 492 SUPERMARKET CORP. AND NATIONAL SUPERMARKETS ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL SIMILARLY SITUATED PERSONS,	:
Plaintiffs,	:
- against -	:
AMERICAN EXPRESS COMPANY AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,	:
Defendants.	:

03 Civ. 9592 (RO)

[Filed Dec. 24, 2003]

AMENDED COMPLAINT

Plaintiffs Italian Colors Restaurant, Phuong Corp., Bunda Starr Corp., 492 Supermarket Corp. and the National Supermarkets Association, Inc., on behalf of themselves and all others similarly situated, allege for their class action complaint against American Express Company ("American Express") and American Express Travel Related Services Company, Inc. ("TRS") (together, except as the context requires,

"American Express"), upon knowledge with respect to their own acts and upon information and belief with respect to all other matters, as follows:

I.

INTRODUCTION

1. American Express is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants. In the words of the country's leading credit card firm, Visa U.S.A., "American Express holds a near monopoly in the charge card market."

2. American Express leverages its "near monopoly" and market power in the market for charge card services by requiring that merchants, as a condition of being permitted to accept American Express charge cards or corporate cards, agree to accept American Express-branded credit cards and debit cards (including so-called "Travel Funds Cards") at grossly supra-competitive prices (the "Tying Arrangements").

3. This action challenges the Tying Arrangements as unlawful restraints of trade under the federal antitrust laws. Brought on behalf of all merchants that accept American Express products or that have accepted American Express products during the Statutory Period (as defined below), this class action seeks an injunction permanently restraining American Express from tying the provision of credit or debit card services to the charge card and corporate card services that it offers merchants, as well as monetary damages.

II.

JURISDICTION AND VENUE

4. Pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26, this action seeks to prevent and restrain violations of section 1 of the Sherman Act, 15 U.S.C. § 1. In addition, the Plaintiffs seek damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391 and 15 U.S.C. §§ 22 and 26, because American Express "may be found or transacts business" within this District. Among other things, American Express and its subsidiary TRS have marketed their charge card services, along with the unlawfully tied credit card services, to thousands of merchants within this District. The interstate commerce that is affected by the antitrust violations alleged in this action is carried on, in part, within this District.

III.

THE PARTIES

6. Plaintiff Italian Colors Restaurant, a California partnership, owns and operates the Italian Colors Restaurant in Oakland, California, where it accepts American Express cards.

7. Plaintiff Phuong Corp., a New York corporation, owns and operates the Nam Phuong Restaurant in New York City, where it accepts American Express cards.

8. Plaintiff Bunda Starr Corp. is a New York corporation with its principal place of business in New York, New York. Bunda Starr Corp. owns and operates Brite Buy Wines & Spirits, where it accepts American Express Cards.

9. Plaintiff 492 Supermarket Corp. is a New York corporation, with its principal place of business in Brooklyn, New York. 492 Supermarket Corp. owns and operates an Associated Supermarket, where it accepts American Express cards.

10. Plaintiff National Supermarkets Association, Inc. (the "NSA") is a not-for-profit corporation organized under the laws of New York. The NSA operates as a voluntary membership-based trade association that represents the interests of independently owned supermarkets. The NSA currently represents approximately 500 independently owned supermarkets, and has close to 200 full members. The NSA's members own and operate supermarkets, typically as franchisees of large national or regional supermarket chains.

11. Many of the members of the NSA accept American Express cards at their supermarkets and otherwise have standing to sue in this action. The interests that the NSA seeks to protect by its participation in this action are germane to its organizational mission, and appearance in this action by the individual members of the NSA is not required in order to achieve the objects of the litigation. NSA disclaims any interest in money damages, but seeks injunctive relief on behalf of its members.

12. Defendant American Express Company is a New York corporation with its principal place of business in New York, New York.

13. Defendant American Express Travel Related Services Company, Inc. is a Delaware corporation, with its principal place of business in New York, New York. TRS is a wholly owned subsidiary of American Express.

IV.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23(b)(2) to restrain an unlawful practice under section 1 of the Sherman Act. Plaintiff also seeks certification as a class action under Rule 23(b)(1) and (b)(3).

15. The class is comprised of all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations (the "Statutory Period") throughout the United States (the "Class"). The Class does not include American Express, its subsidiaries, directors, officers, or members of their families.

16. The Tying Arrangements affect each merchant that accepts American Express cards. The members of the Class are so numerous that joinder of all members is impracticable.

17. There exist no conflicts of interest as between the named plaintiffs and the other Class members. Plaintiffs have retained counsel that is competent and experienced in federal antitrust litigation. Plaintiffs and their counsel will fairly and adequately represent the interests of the Class.

18. In relevant respect, American Express has acted and continues to act on grounds that are generally applicable to the Class, such that final injunctive relief with respect to the Class as a whole is appropriate.

19. This class action is superior to any other method for the fair and efficient adjudication of this dispute. The damages suffered by many members of the Class are small in relation to the expense and burden of individual litigation and therefore it is highly impractical for individual Class members to attempt to vindicate their interests individually. There will be no extraordinary difficulty in the management of this Class action.

20. Throughout the Statutory Period, American Express uniformly imposed the Tying Arrangements upon all Class members. All Class members have been damaged in precisely the same fashion, by precisely the same conduct. The degree of damages suffered by individual Class members is readily calculable according to an ascertainable formula. For all of these reasons, questions of law and fact will predominantly be common to the Class. Among the questions of law and fact common to the Class are:

(i) Whether American Express demands from merchants, as a condition of being permitted to accept American Express general purpose or corporate charge cards, that the merchant must also accept American Express branded credit and debit cards and services;

(ii) Whether American Express's Tying Arrangements are *per se* unlawful, because: (a) American Express possesses and exercises monopoly or market power in the market for charge card services, or in the market for corporate card services; or (b) American Express possesses economic power sufficient to make probable the coercive Tying Arrangements; and

(iii) Whether the merchant discount rates that members of the Class have been forced to pay for American Express-branded credit and debit card transactions exceed the rates that would prevail in the absence of the Tying Arrangements, or in otherwise competitive markets for credit and debit card services.

V.

FACTUAL BACKGROUND

21. Founded in 1850, American Express is primarily engaged in the business of providing travel related services, financial advisory services and international banking services throughout the world.

The Core Charge Card Business

22. Through its wholly owned subsidiary, TRS, American Express issues to consumers general purpose charge cards that include the American Express Green Card (also known as the "Personal" card), American Express Gold Card, and American Express Platinum Card, among others. Charge cards, according to descriptive materials disseminated by American Express, "are primarily designed as a method of payment and not as a means of financing purchases of goods or services." Charge cards require payment by the cardholder of the full amount billed each month, and no finance charges are assessed (although accounts that are past due are subject, in most cases, to a delinquency assessment). Charge cards also generally carry no pre-set spending limits. For purposes of this Complaint, the term "general purpose" charge cards is used to refer to those charge cards that are issued directly to consumers (as opposed to a corporate charge card) and that are accepted at a wide

variety of merchants (as opposed to a proprietary card, such as a Macy's charge card).

23. In addition to issuing American Express-branded general purpose charge cards to consumers, TRS acts as a "merchant acquirer," meaning that it "acquires" merchants for the American Express network, and it manages all aspects of the relationship with that merchant. TRS signs up new merchants through a variety of sales channels, including a proprietary sales force, third party sales agents, the Internet, telemarketing and by receiving in-bound inquiries from merchants who seek to do business with American Express. Approximately four million merchants have been acquired for the American Express network.

24. Once a merchant enters into an agreement with TRS to accept American Express products as a method of payment for goods and services, that merchant becomes known as a "service establishment" in the vernacular of American Express. When a cardholder (known as a "Cardmember") presents the charge card for payment, the service establishment creates a record of charge for the transaction and submits it to TRS for payment.

25. Before making payment to the service establishment, TRS deducts its fee, known as the "merchant discount fee." This discount fee is calculated by taking the amount of the charge submitted by the service establishment and multiplying it by the applicable "discount rate." As of April 2003, the discount rate for service establishments published on American Express's website was three percent; in reality, many merchants are charged a rate higher than three percent. At the three percent rate, a

merchant submitting a charge of $100 would receive from TRS payment of $97. TRS then receives payment of the $100 from the Cardmember within 30 days. To finance the float, TRS sells most charge card receivables to American Express Credit Corporation, another subsidiary, which in turn issues commercial paper and sells medium- and long-term notes to the public markets.

26. While the discount rate charged by TRS does vary somewhat with the type of participating establishment and the charge volume, it is generally far higher than the discount rate that merchants pay in connection with credit cards (other than American Express-branded credit cards). The merchant discount rate for Visa, for example (including the "interchange fee" paid by the "acquiring" bank to the card-issuing bank, along with the acquirer's fee and the fees due to the Visa association) is generally in the vicinity of 1.8% – more than 35% lower than the fees charged by American Express.

27. Merchants are willing to pay American Express's higher fees (to the extent they are) in order to access a higher class of customer, to create incremental sales and to register higher average per-purchase dollar amounts. Holders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes. Thus, in a marketing presentation to Wal-Mart several years ago, American Express emphasized that seven million holders of American Express charge cards were business customers who "are usually required by the company to use The Card for business purposes." As American Express pointed out, other payment cards are not

substitutes for these cardholders and, thus, from the merchant's point of view these transactions represent valuable incremental sales.

28. In general, according to American Express, the average purchase on an American Express card is 17% higher than the average purchase made on a credit card. Thus, American Express observes in its most recent SEC Form 10K that "TRS has generally been able to charge higher discount rates to participating establishments than its competitors as a result of TRS' attractive Cardmember base."

American Express And The Corporate Card Market

29. In addition to the general purpose charge cards that TRS issues to individual consumers, American Express, through its Global Corporate Services Group ("GCSG"), issues corporate charge cards to corporations and other business entities ("Corporate Cards").

30. According to the definition employed by GCSG, a Corporate Card is a charge card issued to individuals through a corporate account established by their employer for business purposes. GCSG issues Corporate Cards to at least 70% of the companies included in the Fortune 500, and is likewise the leading issuer of Corporate Cards to middle-market companies (which GCSG defines as U.S. firms with annual revenues of $10 million to $1 billion and annual travel and entertainment expenditures between $100,000 and $10 million) and small businesses.

31. American Express possesses a commanding market share in the U.S. market for Corporate Card services. Indeed, as American Express notes in its marketing presentations to merchants, many companies require their employees to use the Amer-

ican Express Corporate Card for business related purchases. American Express's competitors in the domestic market for Corporate Card services include Diner's Club, Visa U.S.A. ("Visa") and MasterCard International ("MasterCard").

American Express And The Credit Card Market

32. Unlike a charge card, a "credit card" is a product that provides access to a revolving credit facility in order to finance the purchase of goods and services. At the time they receive the monthly bill, credit cardholders have the option of "revolving" their balance over into the next month and paying a predetermined interest rate to the issuer. The dominant credit card networks in the United States are Visa and MasterCard, which together account for more than 90% of all transaction volume on credit cards. In contrast to American Express's typical discount rates of three percent or more (which the company applies uniformly to its credit and charge card offerings), MasterCard's typical credit card discount rate is approximately 1.9% or, in the language of the industry, 190 "basis points." Visa's ordinary discount rate is slightly lower.

33. The merchant discount rate charged by Discover Card is lower yet – generally 30% below the rates charged by Visa. The Discover Card rate is the best measure of a true competitive discount rate in the U.S. credit card market, as Discover Card has no monopolistic pricing power.

34. American Express participates in the market for general purpose credit cards through American Express Centurion Bank ("Centurion Bank"), a wholly owned subsidiary and FDIC-insured deposit institution. Centurion Bank issues Blue from American

Express, the Optima Card, and all other American Express-branded revolving credit products in the United States. Whereas receivables in the charge card business are financed by American Express Credit Corporation, the receivables generated by American Express's activities in the credit card market are financed by Centurion Bank through the sale of notes and certificates of deposit.

35. As detailed below, American Express's business in the markets for credit card issuance and credit card services has grown dramatically over the last decade, and particularly in the past several years. Substantially all of that growth is attributable to the unlawful practice of tying the provision of credit card services to the provision of general purpose charge card and Corporate Card services.

36. American Express first launched the Optima credit card in the late 1980's. Upon information and belief, American Express service establishments were required by the terms of merchant services agreements to accept Optima as a condition of being allowed to accept the American Express charge cards upon which they depended. As a result, Optima experienced no difficulty in penetrating the merchant community; it simply leveraged the massive installed base that American Express had developed in the market for charge card services.

37. The development of Optima highlights the distinctness of the credit and charge card markets. When American Express introduced Optima, Visa urged its member banks to boycott American Express products, such as traveler's checks, stressing that the new Optima credit cards, unlike the traditional American Express charge card, were "directly com-

petitive" with Visa credit cards. Indeed, Visa's CEO wrote the banks that the new Optima product "is positioned to be directly competitive with your Visa and MasterCard portfolios . . . [Y]ou may wish to rethink your position in offering American Express products."

38. While American Express was able to leverage dominance in one market to gain a foothold in another, the initial experience with Optima underscores the difficulty of navigating sharply distinct market environments. As a new entrant in the credit card market, American Express applied risk screening criteria and models drawn from its experience in the charge card market. The result was disastrous, and by 1993 American Express had losses of over $2 billion from bad loans in the credit card market.

39. Undeterred, American Express soon redoubled its efforts to leverage its charge card market power and thereby gain market share in credit cards. "In late 1994," according to an American Express 10K filing, "the Company began aggressively to expand its credit card business." Since that time – and particularly with the recent launch of its "Blue" credit card – American Express's growth in the credit card business "has been among the top tier of card issuers."

40. Indeed, the growth of American Express's credit card business has been extraordinary. Over the past five years, the point-of-sale dollar volume of American Express's credit cards has increased at least ten times more than that of any other credit card network.

41. The launch of Blue was specifically designed to extend American Express into a new market. As a

senior American Express executive has stated: "Blue has accomplished our primary purpose, which was to establish American Express as more than a charge card company . . . Blue has been a breakthrough, setting us up as a credit card issuer."

42. In 2001, the last year for which pertinent information is available, American Express credit card point-of-sale volume totaled more than $42 billion – almost one-quarter the size of American Express's $181 billion charge card volume. Since 2001, American Express has waged aggressive marketing campaigns in the credit card market on behalf of Blue. Presumably, American Express's volume and share in the credit card markets have continued to grow since that time.

43. Looking forward, there is reason to expect that American Express's acquisition of market share in the credit card market is about to accelerate sharply, fueled by the unlawful Tying Arrangement. Beginning in or around the mid-1990's, American Express initiated a strategy whereby it would invite banks and other qualified financial institutions in the United States to license the American Express logo and begin issuing credit cards on the American Express network (the "Bank Strategy"). The lynchpin of the Bank Strategy – and the value proposition that underlay American Express's approach to banks – was the unlawful Tying Arrangement. Because of the unlawful tie-in to American Express charge cards, issuing banks would be assured that merchants would accept the American Express branded credit card offerings, notwithstanding that those offerings were priced above competitive rates by a factor of roughly 35%.

44. The Bank Strategy did not work, however, for one reason: the rules and policies of Visa and MasterCard in the United States called for expulsion of members who issue credit cards branded with the marks of American Express, Discover Card or any entity other than Visa or MasterCard. In response to its inquiries, American Express found no banks that were willing to forfeit membership in Visa or MasterCard, and the Bank Strategy appeared dead in its tracks.

45. In 1998, however, the U.S. Department of Justice, responding in part to concerns voiced by American Express, initiated an action in the United States District Court for the Southern District of New York against Visa and MasterCard, alleging that the associations' rules violate federal antitrust laws to the extent that they preclude member banks from issuing credit cards that carry the logos of American Express or other brands other than Visa or MasterCard (the "DOI Case"). In October 2001, the district court ruled in favor of the Justice Department and was subsequently upheld on appeal by the U.S. Court of Appeals for the Second Circuit. As a result, the approximately 680 banks that comprise the Visa and MasterCard networks are or soon will be contractually free to issue credit cards (and debit cards) bearing the American Express logo.

American Express's Plans After The DOJ Case

46. American Express has stated that it intends to approach these commercial banks as soon as the appeal of the DOJ Case is favorably decided or settled. Upon information and belief, defendants have begun this process. More particularly, American Express is in the process of inviting commercial

banks to issue American Express-branded credit cards, secure in the knowledge that: (a) all American Express service establishments will be forced to accept those credit cards lest they forfeit the ability to accept American Express general purpose charge cards and Corporate Cards; and (b) the merchants will be forced to pay discount fees (including an interchange fee to the issuing bank) that are far higher than the rates charged by Visa and MasterCard, and at least 50% higher than the true competitive rate.

47. American Express's "value proposition" – to allow issuer banks to share in monopoly profits – is potentially even more powerful in the debit card market, which American Express likewise intends to exploit. Pursuant to the terms of 2003 settlement agreements that have been entered into by Visa and MasterCard in *In Re Visa Check/Mastermoney Antitrust Litigation*, Visa and MasterCard are required to untie credit and debit card services. As a result, the typical interchange rates charged for off-line debit transactions by Visa and MasterCard have already been slashed, on a prospective basis, to approximately 85 basis points, or roughly 0.85%. Accordingly, an issuing bank that provides access to the demand deposit accounts of its depositors via an off-line debit card bearing the Visa flag or MasterCard logo will receive 0.85% of the dollar volume consummated on that card.

48. Banks issuing off-line debit products under the American Express logo stand to reap several times the interchange fees that an off-line debit issuer may earn with Visa or MasterCard. In the wake of the *Visa Check* settlement, only American Express has the power to tie the provision of debit card services to

its other services (in this case, charge and Corporate Card services), and thereby exact supracompetitive rents in the tied product market. Faced with the opportunity to double, and possibly triple their profits, banks will eventually commit to American Express branded debit products virtually all of the resources they have available for the promotion of off-line debit.

The Unlawful Tying Arrangement

49. The standard form "Agreement For American Express Card Acceptance" which TRS uses with merchants in the retail industry (the "Merchant Agreement") provides that the merchant must accept "any card issued by [American Express] bearing [its] name, trademark, service mark or logo." Pursuant to the terms of the Merchant Agreement, a retailer may not accept American Express charge cards unless it also agrees to accept American Express-branded credit cards and all other American Express-branded cards. Likewise, a retailer may not accept American Express Corporate Cards unless it also agrees to accept American Express-branded credit cards.

50. American Express charges merchants the same discount rates on all American Express-branded products, including charge, corporate charge, credit, and debit cards.

51. Merchants are also precluded under the Merchant Agreements from seeking to "steer" or induce customers at the point of sale to use less expensive payment media, such as other credit cards, cash, or debit cards. American Express defines such merchant conduct as "suppression" of American Express cards, and it employs a policy of "canceling merchants who suppress usage of the American Express Card."

52. The net result of American Express's policies is that merchants are forced to accept American Express-branded credit cards at supracompetitive prices. But for the Tying Arrangement, the vast majority of merchants that accept American Express would not accept American Express branded credit cards at the supracompetitive discount rate charged by TRS. Most merchants would not willingly pay discount fees that are at least 35% higher than competitive rates. They do not believe that accepting American Express branded credit cards attracts incremental customers or generates larger purchases, relative to alternative means of payment.

53. However, even for those merchants who *do* believe that accepting American Express credit cards attracts incremental customers or generates larger purchases – i.e., even for those merchants who would accept American Express branded credit cards absent the coercive Tying Arrangements – the Tying Arrangements nevertheless cause economic injury because, in the absence of the ties, the discount rate for American Express credit cards could not exceed competitive levels. Given the opportunity, enough merchants would decline American Express-branded credit cards that the merchant discount fees associated with those credit cards would come down to a competitive level, which is best measured by the merchant discount fees charged by Discover Card.

VI.

RELEVANT MARKETS

54. General purpose charge card services form the product dimension of a relevant market. The geographic dimension of this market is the United

States (the "General Purpose Charge Card Services Market").

55. The dominant participant in the General Purpose Charge Card Services Market is American Express. According to an informational bulletin issued by Visa, "American Express holds a near monopoly in the charge card market. Its only significant competitor is Diner's Club." In fact, Diners Club, which is owned by Citicorp, has less than one fifteenth the market share of American Express in the market for general purpose charge cards. Many consumers do not consider other payment systems suitable substitutes for their use of charge cards.

56. Corporate Card services form the product dimension of another relevant market (or submarket), the geographic dimension of which is the United States (the "Corporate Card Services Market"). American Express possesses a commanding share of the Corporate Card Services Market. From the point of view of the cardholder, other payment systems are not suitable substitutes for Corporate Cards.

57. General purpose credit card services form the product dimension of another relevant market, the geographic dimension of which is the United States (the "Credit Card Services Market").

58. General purpose credit cards are a unique product and bundle of services. Many consumers do not consider other payment systems suitable substitutes for their use of general purpose credit cards.

59. Because of these consumer attitudes, the acceptance of general purpose or corporate charge cards is not a substitute for the acceptance of credit cards from the point of view of merchants. Merchants who refuse to accept credit cards will inevitably

lose a significant portion of the sales they receive from consumers who value access to revolving credit. Merchants who refuse to accept general purpose charge cards or Corporate Cards will inevitably lose a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others who value the features of the general purpose charge card or the Corporate Card.

60. In addition, as measured under the guidelines established by the United States Department of Justice and the Federal Trade Commission, there exists sufficiently low cross-elasticity of demand as between (i) general purpose charge cards or Corporate Cards, on the one hand, and (ii) general purpose credit cards, on the other, to compel the conclusion that American Express commands market power in a market for charge card services. American Express is able to – and has – maintained prices for its core charge card services at levels that are more than 5% greater than a competitive baseline price without losing appreciable merchant acceptance, notwithstanding the existence of lower priced credit card services providers, such as Visa and MasterCard. Indeed, if American Express has experienced any erosion in merchant acceptance it is only because price levels are some 30% or more above a competitive baseline – far higher than the DOJ Guidelines require.

VII.

HARM TO COMPETITION AND TO CONSUMERS

61. As a result of the Tying Arrangements, American Express is able to extract from merchants discount fees in the tied market for credit card ser-

vices that are far higher than its competitors' fees for credit card services. At the same time, the fees that American Express charges merchants for services in the tying product market for charge card services (or, more narrowly, for corporate charge card services) exceed the fees charged by American Express's competitors.

62. Accordingly, merchants pay significantly more for the tied bundle of services than they would pay in the absence of the coercive tie-in. As merchants pass these costs along, prices rise and consumers are injured.

63. Another effect of the Tying Arrangement is to effectively preclude a competitive low cost provider such as Discover Card, or any future credit card market entrant, from accessing the critical issuing and marketing resources of third party issuers, specifically commercial banks. By dint of the Tying Arrangements, the banks have the ability to share in supracompetitive profits by issuing American Express-branded credit cards. Their finite issuing and marketing resources, therefore, will not be available to Discover or any future entrant attempting to provide a lower cost service.

64. In addition, American Express's ability to charge merchants supracompetitive fees and share them with issuing banks will result in the foreclosure of a significant portion of the credit card issuing market, as issuing banks that had previously committed resources to Visa and MasterCard will dedicate their issuing and marketing resources to American Express branded cards.

65. The Tying Arrangements will further dramatically foreclose competition in the market for off-line

debit. In the wake of the *In Re Visa Check/ Mastermoney Antitrust Litigation*, only American Express will be able to promise the banks: (a) that an installed base of millions of merchants will be required to accept its off-line debit product; and (b) that those merchants will be forced to pay a supracompetitive interchange fee to the issuing bank – perhaps 500% higher than the competitive rate. As set forth above, American Express's ability to tie debit card services to general purpose and corporate charge card services will thus absorb the finite issuing and marketing resources of issuing banks and foreclose the ability of other firms to compete.

FIRST CLAIM FOR. RELIEF

For Violation Of Sherman Act § 1 Through Unlawful Tying Of (A) Charge Card Services And (B) Credit Card Services

66. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

67. Beginning at a time that is presently unknown to plaintiffs, but not later than four years before the date of filing the instant action, American Express instituted its policy of requiring service establishments to accept American Express-branded credit cards as a condition of being permitted to accept American Express charge cards.

68. The Tying Arrangement affects a substantial amount of interstate commerce. In particular, more than four million service establishments in every U.S. state are forced to accept American Express-branded credit cards at supracompetitive rates.

69. The tying product, charge card services, is distinct from the tied product, credit card services.

Among other things, the distinctness of the two products is evident in the very structure of American Express's businesses, as well as the company's numerous statements and disclosures, such as the American Express website, which divides all American Express cards into charge card products and credit card products.

70. American Express and TRS have actually tied the provision of charge and credit card services, as the Tying Arrangement has been implemented in millions of merchant agreements.

71. American Express has appreciable market power in the tying product market. As set forth above, American Express has a virtual monopoly in the market for charge card services.

72. Even if it were considered that the product dimension of a relevant market were the provision of credit and charge card services, American Express would still possess appreciable market power (albeit without possessing a commanding market share), as evidenced by its ability to impose the Tying Arrangement upon merchants and to extract supra-competitive prices for the tied product, credit card services.

73. The maintenance of the Tying Arrangement has the effect of foreclosing competition and is otherwise anticompetitive.

74. The Tying Arrangement is per se unlawful. Alternatively, to the extent it is measured under a "rule of reason" analysis, the adverse effect of the Tying Arrangement upon competition as a whole in the relevant market is not outweighed by any pro-competitive virtue, and any pro-competitive virtue

could be achieved through alternative means that are less restrictive of competition.

75. In the absence of appropriate injunctive relief, American Express's violations of the antitrust laws will continue unabated and the Class will continue to suffer the harms complained of in this action.

76. As a direct, foreseeable and proximate result of American Express's violation of the Sherman Act, section 1, plaintiffs and the Class have been injured in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF

For Violation Of Sherman Act § 1 Through Unlawful Tying Of (A) Corporate Card Services and (B) Credit Card Services

77. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

78. The unlawful Tying Arrangement obligates merchants to either accept American Express-branded credit cards at grossly supracompetitive rates or forfeit the ability to accept American Express Corporate Cards.

79. American Express Corporate Cards and American Express-branded credit cards are distinct products.

80. American Express exercises market power in the Corporate Card Services Market.

81. The maintenance of the Tying Arrangement has the effect of foreclosing competition, is otherwise anticompetitive, and is both per se unlawful and an unreasonable restraint of trade.

82. In the absence of appropriate injunctive relief, American Express's violations of the antitrust laws

will continue unabated and the Class will continue to suffer the harms complained of in this action.

83. As a direct, foreseeable and proximate result of American Express' violation of the Sherman Act, section 1, plaintiffs and the Class has been injured in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

For Violation Of Sherman Act § 1 Through Unlawful Tying Of (A) Charge or Corporate Card Services, and (B) Debit or Pre-Paid Travel Fund Card Services

84. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

85. Debit cards allow a cardholder to access his or her bank or brokerage account directly at the point of sale either "on-line" (via a PIN pad) or "off-line" (by signing a slip). American Express currently issues two off-line debit products, Fidelity American Express Gold Card and Fidelity American Express Platinum Cards, both of which allow users to access at the point of sale accounts maintained at Fidelity Investments.

86. American Express also issues pre-paid cards known as "Travel Funds" Cards, whereby the cardholder accesses funds that she has specifically deposited with American Express for this purpose. The Travel Funds Cards are likewise subject to defendants' coercive Tying Arrangements. A fully pre-paid card such as the Travel Funds Cards carries no appreciable fraud risk and is, for all intents and purposes, a debit card that accesses an account that is controlled by American Express. In a competitive market, the discount fees charged to merchants for pre-paid Travel Funds card services would be no

higher than the fees charged for on-line, PIN-based debit cards that access demand deposit accounts – i.e., fees that are generally less than 15 cents on a $100 restaurant transaction. American Express, however, leverages its market power to coerce merchants to accept the Travel Funds cards and pay discount fees of roughly $3.00 on a $100 transaction.

87. Further, as detailed above, American Express currently has plans to engage commercial banks to issue off-line debit cards under the American Express logo.

88. The unlawful Tying Arrangement obligates merchants to either accept these American Express-branded debit products at grossly supracompetitive rates or forfeit the ability to accept American Express charge cards (including American Express Corporate Cards).

89. Debit cards and pre-paid "Travel Funds Cards" are products distinct from Corporate Cards. Debit cards and pre-paid "Travel Funds Cards" are also distinct from general purpose charge cards.

90. The maintenance of the Tying Arrangement as applied to debit cards has the effect of foreclosing competition, and is both per se unlawful and an unreasonable restraint of trade.

91. In the absence of appropriate injunctive relief, American Express's violations of the antitrust laws will continue unabated and the Class will continue to suffer the harms complained of in this action.

FOURTH CLAIM FOR RELIEF

For Violation Of Sherman Act §§ 1 and 2
Based On The "Collective Action Waivers"

92. Plaintiffs repeat and reallege each of the foregoing allegations as though fully set forth herein.

93. In pertinent part, section 2 of the Sherman Act prohibits a defendant in possession of monopoly power in the relevant market from willfully acting to maintain its ability to exercise monopoly power to the detriment of plaintiffs. Section 1 of the Sherman Act, in pertinent part, prohibits contracts in restraint of trade.

94. American Express possesses monopoly power in the relevant markets for corporate card services and charge card services.

95. American Express's ability to maintain and exercise its monopoly power, and to propagate the Tying Arrangements, is threatened by the availability of class action lawsuits and class-wide arbitrations as tools for challenging American Express's anti-competitive practices. Indeed, as American Express is aware, class-wide action is the only viable tool available to redress the sort of unlawful tying arrangements that are at issue in this action.

96. In order to maintain its ability to exercise monopoly power, American Express imposes upon merchants in its standard form merchant services agreements a provision designed to insulate itself from any class-wide liability for antitrust violations (the "Collective Action Waivers"). Under the terms of the Collective Action Waivers, the merchant (i) forfeits the ability to act as a representative plaintiff in any class action; (ii) forfeits the ability to participate as a passive class member (and presumably

to share in the benefit of any award) in any class action; and (iii) forfeits any right to have his or her claim consolidated or aggregated with any claim asserted by any other merchant in any arbitration. American Express's practice is to insert the Collective Action Waivers into standard form adhesion contracts with merchants that lack the power to negotiate individual terms.

97. If the Collective Action Waivers were given effect, then all merchants would suffer injury, because enough merchants would be precluded from participating in (or even being represented in) a class action that the efficacy of the action would be substantially eviscerated.

98. Defendants' actions, in forcing small merchants to execute Collective Action Waivers as a condition of being permitted to accept products in which American Express enjoys substantial market power, are reasonably calculated to protect and maintain American Express' monopoly power and its ability to use that power in restraint of trade.

99. Moreover, because the Collective Action Waivers would proscribe all meaningful relief for small merchants, defendants' practices amount to a prospective waiver of antitrust liability, in violation of Section One of the Sherman Act.

100. In the absence of an Order declaring that the Collective Action Waivers violate sections 1 and 2 of the Sherman Act and are therefore unenforceable, the Class will suffer irreparable harm.

WHEREFORE, Plaintiffs respectfully demand:

A. That the Court declare, adjudge and decree that Defendants have committed the violations of federal law alleged herein;

B. That the Court declare that the imposition of the Collective Action Waivers violate sections 1 and 2 of the Sherman Act, and that the Court permanently enjoin and restrain the enforcement of the Collective Action Waivers;

C. That the Court enter an Order pursuant to Fed. R. Civ. P. 23 permitting this action to be maintained as a class action on behalf of the Class specified herein;

D. That defendants be permanently enjoined and restrained from implementing or enforcing the Tying Arrangements, or from entering into agreements with merchants whereby the ability of the merchant to accept American Express general purpose or corporate charge cards is conditioned upon its agreement to accept American Express credit or debit cards (including "Travel Funds" Cards);

E. That the Court award damages for violations of the First and Second Claims For Relief in amounts to be determined at trial and then trebled;

F. That the Court award attorneys' fees and costs of suit; and

G. That the Court award such other and further relief as it may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand trial by jury of all issues so triable.

Dated: New York, New York

December 23, 2003

FRIEDMAN & SHUBE

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Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ITALIAN COLORS RESTAURANT, ET AL.,	:
	:
Plaintiffs,	:
- against -	:
	:
AMERICAN EXPRESS CO., ET AL.,	:
	:
Defendants.	:

03 CV 9592 (GBD), 03 CV 10271 (GBD),
03 CV 9517 (GBD), 04 CV 00266 (GBD),
03 CV 00366 (GBD), 04 CV 1558 (GBD)

DECLARATION OF GARY B. FRIEDMAN

Gary B. Friedman declares the following to be true under penalty of perjury and 28 U.S.C. § 1746:

1. I am a member of Friedman & Shube, counsel for the plaintiffs in the above-referenced action. I submit this declaration in opposition to Defendants' Motion to Dismiss Proceedings In Favor Of Arbitration.

2. Proving defendants' liability on the substantive Sherman Act § 1 claims for unlawful tying will necessitate very broad discovery. At this juncture it is not possible to state with a high degree of certainty just how many depositions of party and non-party witnesses will be required. However, based upon my experience in other large antitrust actions on behalf of defendants and plaintiffs, I believe we can safely state that not less than 30 depositions will be required by the plaintiffs and defendants on liability alone.

Surely American Express expects no less. See Defendants Memorandum In Support of Application to Extend Stay of Discovery at 5 (discussing the broad and "burdensome" nature of antitrust discovery).

3. Among many other areas of inquiry that should be explored through depositions and documents in this case are:

- Competition in the payments industry in general and, more specifically, the nature and scope of competition between Amex and each of:
  - o MasterCard
  - o Visa
  - o Discover
  - o Diner's/Citibank
- Statistics about the payments card industry in general, and broken down by many categories, including revolving credit use, charge, debit, etc.
- Amex merchant data, including the dollar volume of transactions broken down by payment type and by merchant type
- Historical, current and future discount fee pricing, broken down by merchant categories
- Historical, current and future discount fee pricing of each of Amex's competitors, broken down by merchant categories
- Information regarding how Amex allocates its network costs as between cardholders and mechants [sic]
- Information regarding how each of Amex's competitors allocates its network costs as between cardholders and mechants [sic]

- History of Amex's "Honor All Cards" rule; experience in US and abroad
- The costs and benefits to Amex of maintaining a single "acceptance mark"
- The "Optima Card" and Amex's experience in the 1980's of attempting to break into the revolving credit card market
- The "Blue" Card roll out and marketing
- Amex's "debit card intiative," [sic] which it discontinued in the wake of the Visa Check filing in late 1996 or early 1997, out of concerns about incurring similar liability
- *Amex's "bank strategy" in the wake of the DOJ* litigation
- Amex's transaction with MBNA, whereby MBNA recently agreed to issue Amex-branded revolving credit card products, and the relationship of the tying arrangement to that transaction
- Amex's enforcement of policies against merchant "steering" of consumer payment type preferences
- Amex's presentations to other banks and the importance of "premium pricing" and high discount fees to that strategy

4. The preceding list is far from exhaustive, and covers only essential areas. It is clearly reasonable to assume that well over 30 depositions will be taken (exclusive of depositions of plaintiffs) and I expect that American Express's counsel will not dispute that 30 is indeed a low estimate of the number of depositions.

5. Using this unrealistically low estimate of 30 depositions, it is clear that the out-of-pocket costs related to depositions alone will exceed $100,000. In this case, the total out-of-pocket cost of each deposition will certainly average over $3,333, including court reporters fees and, where applicable, travel and videotaping. I note that, in Visa Check, there were 400 depositions taken as set forth in the district court decision discussed in our accompanying brief.

6. In addition, document management in this case will begin with a review of the five million page record of Visa Check. Any plaintiff seeking to establish Amex's liability in this case would have to begin by reviewing that record. If the copying, imaging and document management costs associated with such a review were held to 5 cents per page, the cost of this one project alone would be $250,000.

7. No merchant plaintiff could possibly hope to establish Amex's liability for unlawful tying without spending, at a bare minimum, several hundred thousand dollars for depositions and document management. Again, it is not possible to state with certainty what these items will cost. It is possible to state with total certainty that they will exceed $300,000.[1] The totally separate cost of expert witness fees is the subject of the Ddeclaration [sic] of Dr. Gary L. French, submitted herewith, as well as the Declaration of Kathleen Schulte.

8. Bound together with this declaration behind the tabs indicated below are true and correct copies of the following documents, and the following declarations:

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[1] In the unlikely event that the defendants seriously dispute these estimates, the plaintiffs would seek an evidentiary hearing, if the Court believes the issue material to its ruling.

Tab	Document
2.	Amended Complaint of Plaintiffs Italian Colors Restaurant, et al.
3.	Representative Sample of 1997-99 Visa Check Media Coverage
4.	Terms and Conditions Of Amex Card Acceptance, October 1999
5.	Declaration of Gary French, Ph. D., with Schedules and CV
6.	Declaration of Kathleen A. Schulte
7.	Declarations of Pre-1999 Merchant Plaintiffs
8.	Excerpts from Deposition of Donald Blumenthal
9.	Excerpts from Deposition of Marc Wells
10.	Internal Amex e-mail dated July 20, 1999
11.	Merchant Matters Mailing Plans
12.	E-mail from Donald Blumenthal, dated July 16, 1999
13.	Amended Complaint of Plaintiffs Cohen Rese Galleries et al.

Dated: New York, New York
June 21, 2004

/s/ GARY B. FRIEDMAN
Gary B. Friedman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ITALIAN COLORS RESTAURANT, ET AL.,	:
	:
Plaintiffs,	:
- against	:
	:
AMERICAN EXPRESS CO., ET AL.,	:
	:
Defendants.	:

03 CV 9592 (GBD), 03 CV 10271 (GBD),
03 CV 9517 (GBD), 04 CV 00266 (GBD),
03 CV 00366 (GBD), 04 CV 1558 (GBD)

DECLARATION OF GARY L. FRENCH, PH. D.

Gary L. French, being first duly sworn, deposes and says:

1. I am Gary L. French, economist and senior vice president of Nathan Associates Inc., an economic and financial consulting firm established in 1946 that provides applied economic research and analysis to public and private clients in the United States and abroad. I am the manager of the litigation practice at Nathan Associates and have directed numerous client engagements involving studies of antitrust liability and damages, such as is required for this case.

2. I have been associated with Nathan Associates as an economist for 25 years. Prior to that I was an assistant professor of economics at Old Dominion University and assistant professor of economics and finance at Texas A&I University. I received a B.B.A. (1966), M.A. in economics (1971), and Ph.D. (19 3)

in economics from the University of Houston. My experience includes a wide range of economic consulting and analytical work, involving both litigation and non-litigation consulting. My economic work in litigation has focused particularly on antitrust cases in a wide range of industries. This work has included matters concerning the structure and conduct of industries, the definition of relevant markets, the determination of economic impact and competitive effects, and the estimation of damages. In many instances, such analyses have concerned the issues of impact upon multiple plaintiffs and plaintiff classes, and the development of class-wide approaches that can be applied to the assessment of damages for each class member. I have provided economic analyses and testimony concerning liability and damages in numerous antitrust class action cases; examples include: *In re Disposable Contact Lens Antitrust Litigation, MDL 1030 (U.S.D.C. Middle District of Florida, Jacksonville Division)* concerning the competitive impact and damages stemming from the refusal of contact lens manufacturers to sell to mail order companies, and *Billy Cook, et al. v. Powell Buick, Hub City Ford and the Louisiana Car Dealers Association CA No. 94-1730 (U.S.D.C. Western District of Louisiana, Shreveport Division)* concerning class certification and impact of alleged price fixing by new vehicle dealers.

3. As the manager of Nathan Associates' litigation practice I have also had administrative responsibility for studies of antitrust liability and damages in numerous class action and individual firm litigation cases in which I was not the testifying expert. Both my roles as a testifying expert and as practice manager provide me with substantial experience and expertise concerning the complexity and cost of

undertaking a study of antitrust liability and damages for the purpose of providing expert analysis and testimony. My curriculum vitae, describing my education and work experience, is attached as Appendix A.

4. I have been asked by counsel to the plaintiffs to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages in an antitrust case, such as that alleged in this litigation. I have also been asked to contrast the likely cost of an expert economic study with the potential recovery of damages by an American Express Card merchant with annual sales volume of $10 million or less,[1] such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding.

5. Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million. For example, in a non-class action case, involving an antitrust counterclaim for monopolization and tying in the medical products industry, total billings for

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[1] It is my u rstanding from plaintiffs' counsel that $10 million of annual sales is the threshold below which American Express Card merchants are required to sign and comply with the standard merchant agreement, which includes a Collection Action Waiver that compels these smaller merchants to arbitrate their claims, and which precludes them from joining forces with other merchants in making their claims.

the expert economic study were approximately $330 thousand during a period of less than a year. Because this case settled, trial preparation and testimony were avoided. In another individual plaintiff antitrust litigation, a health care monopolization case involving a hospital and local specialist medical practices, Nathan Associates' total billings were approximately $500 thousand over a period of nearly three years. This case settled during trial after completion of expert testimony. At the high end of the range, in a complex, multi-year monopolization case involving an aircraft navigational product, Nathan Associates' total billings exceeded $2 million through the trial. In my experience, based upon many years of conducting economic antitrust studies and reviewing the studies of opposing party experts, Nathan Associates billings are representative of the lower likely cost for such studies because our hourly rates and hours billed have usually been lower than those observed for opposing economic experts in the same cases. In summary, the cost of our expert assistance in individual plaintiff antitrust cases has ranged from around $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that this case is more complex than the less costly cases in which we have been involved, but probably less complex than the aircraft navigational product case in which our fees exceeded $2 million, and therefore the cost for this case will fall in the middle of the range of our experience.

6. An economic antitrust study, such as might be undertaken for an individual plaintiff attempting to prove liability and damages in this litigation, is necessarily complex and costly because it involves investigating several antitrust liability and damages

issues and, potentially involves numerous tasks and services. The antitrust liability and damages issues that an expert economist will study in this matter likely include:

- defining the relevant tying and tied product markets and determining whether they are distinct;
- determining whether the defendant has market (monopoly) power in the tying product market, which in turn requires quantification of market share and analysis of entry barriers;
- determining whether the defendant has exercised its market (monopoly) power to enforce the tying arrangement;
- determining whether the tying arrangement has an anticompetitive effect in the tied product market;
- determining what the merchant fees would have been but for the alleged anticompetitive tying; and
- quantifying the dollar amount of damages to the plaintiffs as a consequence of the tying arrangement.

7. The tasks and services that an expert economist will potentially undertake and provide in this matter include:

- review and analysis of documents, data and depositions produced by defendants and third parties;
- interviews of third parties and industry experts;

- research, review and analysis of publicly and commercially available data and analysis concerning the industry structure and performance;
- review and analysis of the information and decisions in other relevant antitrust cases, especially the VISA Check/MasterMoney litigation and the U.S. v VISA and MasterCard litigation;
- review of economic literature relevant to the issues in the case;
- preparation of a report providing expert opinions regarding the antitrust and damages issues and the bases for those opinions;
- review of reports and depositions of the economic experts retained by the opposing parties; and
- testimony at depositions and at trial.

8. Considering the factual complexity of the liability and damages issues to be analyzed and the numerous tasks and services likely to be provided, and based upon my experience as a testifying economic expert and as the manager of Nathan Associates' litigation practice, it is my opinion that fees and expenses for conducting an economic study, preparing an expert report, and providing deposition and trial testimony and other services in this litigation matter will be at least several hundred thousand dollars, and could likely exceed $1 million, depending upon the extent of document and data production and deposition discovery, and the consequent review and analysis required.

9. In contrast to the large out-of-pocket costs reasonably anticipated for just the economic study needed for arbitration or litigation, the expected

recovery of damages is small, even for a small American Express Card merchant at the high end of the annual sales range. Based upon publicly available information concerning the payment card industry and American Express, I have estimated that a small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the mid-point of the damage period covered by this litigation. (See Table 1 for the calculation of estimated overcharges using industry and American Express information from 2001). Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period.

10. I have also estimated, based upon information provided by plaintiffs' counsel concerning the named plaintiffs' American Express Card volume in 2003, the annual, four-year, and trebled damages for both the largest volume and median volume merchants among the named plaintiffs. The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $ 5,252 when trebled. (See Table 2 for the calculation of estimated overcharges using individual plaintiff and American Express average information). The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.

11. In my opinion as a professional economist with substantial experience with individual and class action antitrust litigation, it would not be worthwhile for an individual plaintiff, who, even at the high end of the examples discussed previously, could expect only $12,850 recovery of economic damages, ($38,549 when trebled), to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million. This reality is especially true considering that there is a substantial possibility that the merchant could lose and not recover any damages.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability.

/s/ GARY L. FRENCH — June 18, 2004

Gary L. French, Ph.D. — Date

Table 1.

Calculation of Estimated Economic Damages (Overcharge) for an American Express Merchant with $10 million Annual Sales in 2001

$10,000,000 annual sales		
	amount	
x 23.0%[1]	*$2,300,000*	portion paid by general purpose credit and charge cards (excludes debit cards)
x 17.25%[2]	*$396,750*	American Express share of total general purpose credit and charge card transaction sales volume
x 19.0%[3]	*$75,383*	revolving credit card share of total American Express charge and credit card purchases
x 1.0%[4]	*$754*	estimate of merchant fee overcharge
$754[5]		estimate annual over-charge
$3,015		multiplied by four years
$9,046		trebled

[1] General purpose and proprietary credit cards and charge cards accounted for approximately 23% of all payments for purchases in the U.S. in 2001. Cash, checks and debit cards accounted for approximately 20%, 40% and 8% of dollar payments for purchases in the U.S. in 2001. Source: The Nilson Report, No. 799, November 2003, pg. 6.

(2) American Express charge and credit cards accounted for approximately 17.25% share ($223.9 billion of $1,297.82 billion) of total dollar volume purchases made with general purpose and proprietary credit and charge cards in the U.S. in 2001. Source: The Nilson Report, No. 772, September 2002, pg. 7.

(3) American Express Annual Report for 2001 reports that revolving credit cards accounted for 19% of American Express' total credit and charge card dollar volume in 2001.

(4) It is claimed in the Amended Complaint that the American Express' merchant fee is approximately 3% of the purchase amount, on average, and the overcharge is approximately 1% of the purchase amount, (i.e., 1/3rd of the fee).

(5) $754 = $10,000 x 23% x 17.25% x 19% x 1.0%.

Table 2. Calculation of Estimated 2003, Four-year, and Trebled Overcharge Damages for Named Plaintiffs

Name of Plaintiff	Business Place Address	American Express Volume 2003	Estimated Revolving Credit Volume 2003[1]	Estimated Merchant Fees at 3%[2]	Estimated Overcharge if 1% (i.e. 1/3rd)[2]	Approximate Four-year Overcharge	Trebled Overcharge
492 Supermarket Corp.	492 Myrtle Ave., Brooklyn, NY 11205	$ 167,882	$ 31,898	$ 957	$ 319	$ 1,276	$ 3,828
Bunda Starr Corp.	11 Ave. of the Americas, New York, NY 10013	$ 250,261	$ 47,550	$ 1,426	$ 475	$ 1,902	$ 5,706
Chez Noelle	34 Willowdale Ave., Prt Washington, NY 11050	$ 230,343	$ 43,765	$ 1,313	$ 438	$ 1,751	$ 5,252
Cohen Rese Gallery	432 Sutter St., San Francisco, CA 94108	$ 175,780	$ 33,398	$ 1,002	$ 334	$ 1,336	$ 4,008
DRF Jewelry Corp.	51 Willoughby St., Brooklyn, NY 11201	$ 25,397	$ 4,825	$ 145	$ 48	$ 193	$ 579

Table 2. Calculation of Estimated 2003, Four-year, and Trebled Overcharge Damages for Name[illegible]laintiffs

Name of Plaintiff	Business Place Address	American Express Volume 2003	Estimated Revolving Credit Volume 2003[1]	Estimated Merchant Fees at 3%[2]	Estimated Overcharge if 1% (i.e. 1/3rd)[2]	Approximate Four-year Overcharge	Trebled Overcharge
Il Forno	909 Prospect St., Suite 190, La Jolla, CA 92037; 2901 Ocean Park Blvd., Santa Monica, CA 90405	$ 991,565	$ 188,397	$ 5,652	$ 1,884	$ 7,536	$ 22,608
Italian Colors	2220 Mountain Blvd. #100, Oakland, CA 94611	$ 255,156	$ 48,480	$ 1,454	$ 485	$ 1,939	$ 5,818
Mai Jasmine Corp.	3355 Via Lido, Newport Beach, CA 92663; 844 Hermosa Ave., Hermosa Beach, CA 90254	$ 565,100	$ 107,369	$ 3,221	$ 1,074	$ 4,295	$ 12,884

Table 2. Calculation of Estimated 2003, Four-year, and Trebled Overcharge Damages for Named Plaintiffs

Name of Plaintiff	Business Place Address	American Express Volume 2003	Estimated Revolving Credit Volume 2003[1]	Estimated Merchant Fees at 3%[2]	Estimated Overcharge if 1% (i.e. 1/3rd)[2]	Approximate Four-year Overcharge	Trebled Overcharge
Mascari Enterprises	28964 Bouquet Canyon Rd., Saugus, CA 91390	$ 47,850	$ 9,092	$ 273	$ 91	$ 364	$ 1,091
Mim's	235 Roslyn Rd., Roslyn Hts, NY 11577; 33 Berry Hill Rd., Syosset, NY 11791	$ 1,690,749	$ 321,242	$ 9,637	$ 3,212	$ 12,850	$ 38,549
Phuong Corp.	19 Ave. of the Americas, New York, NY 10013	$ 72,623	$ 13,798	$ 414	$ 138	$ 552	$ 1,656
Mean		$ 406,610	$ 77,256	$ 2,318	$ 773	$ 3,090	$ 9,271
Median		$ 230,343	$ 43,765	$ 1,313	$ 438	$ 1,751	$ 5,252
Smallest		$ 25,397	$ 4,825	$ 145	$ 48	$ 193	$ 579
Largest		$ 1,690,749	$ 321,242	$ 9,637	$ 3,212	$ 12,850	$ 38,549

Source: Plaintiff name address and 2003 sales volume charged to American Express Cards provided by Plaintiffs' Counsel from information produced by American Express

(1) American Express Annual Report for 2001 reports that credit cards accounted for 19% of American Express' total credit and charge card dollar volume in 2001. This percentage, the latest reported and available, has been used for the calculations in this table.

(2) As claimed in the Amended Complaint, the American Express' merchant fee is approximately 3% of the purchase amount, on average, and the overcharge is approximately 1% of the purchase amount, (i.e., 1/3rd of the fee).

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

November 9, 2012

Mr. Michael K. Kellogg
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036-3209

Re: American Express Company, et al.
v. Italian Colors Restaurant, et al.
No. 12-133

Dear Mr. Kellogg:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. Justice Sotomayor took no part in the consideration or decision of this petition.

Sincerely,

/s/ WILLIAM K. SUTER

William K. Suter, Clerk

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-133

Supreme Court, U.S.
FILED
DEC 21 2012
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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December 21, 2012

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners American Express Company and American Express Travel Related Services Company, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Italian Colors Restaurant; 429 Supermarkets Corp.; Bunda Starr Corp. d/b/a Buy-Rite; Chez Noelle Restaurant Corp.; Cohen Rese Gallery, Inc.; DRF Jewelers Corp.; Il Forno, Inc.; Mai Jasmine Corp.; Mascari Enterprises d/b/a Sound Stations; Mims Enterprises, Inc. d/b/a Mims Restaurant; National Supermarkets Association Inc.; and Phoung Corp. were plaintiffs in cases consolidated before the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners American Express Company and American Express Travel Related Services Company, Inc. state the following:

American Express Company is a publicly traded company. It has no parent company; however, Berkshire Hathaway, Inc. owns more than 10 percent of its outstanding common shares. American Express Travel Related Services Company, Inc. has not issued shares to the public and is a wholly owned subsidiary of American Express Company.

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OPINIONS BELOW

The Second Circuit's opinion on rehearing in light of *Concepcion* (App. 1a-30a) is reported at 667 F.3d 204 ("*Amex III*").[1] The court's prior opinion after further consideration in light of *Stolt-Nielsen* (App. 31a-56a) is reported at 634 F.3d 187 ("*Amex II*"). The court's initial opinion (App. 57a-99a), which was vacated and remanded by this Court, is reported at 554 F.3d 300 ("*Amex I*"). The memorandum opinion and order of the district court (App. 100a-124a) is not reported (but is available at 2006 WL 662341).

JURISDICTION

The Second Circuit entered its judgment on March 8, 2011. On May 9, 2011, the panel *sua sponte* ordered supplemental briefing on the impact of *Concepcion*. On August 1, 2011, prior to the deadline for American Express's petition for certiorari,[2] the Second Circuit issued a statement that the panel was "*sua sponte* considering rehearing" in light of *Concepcion*. App. 125a-126a. As a result, under this Court's Rule 13.3, the time for American Express's petition for certiorari did not start to run until the panel's decision on rehearing. The panel issued that decision on February 1, 2012. American Express filed a timely petition for rehearing *en banc* on February 10, 2012, which was denied on May 29, 2012. App. 127a-149a. The petition for a writ of certiorari was

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[1] Chief Judge Jacobs wrote a dissenting opinion from denial of rehearing *in banc* in which Judge Cabranes and Judge Livingston joined. Judge Cabranes also wrote a separate dissenting opinion. Judge Raggi wrote a dissenting opinion in which Judge Wesley joined. These opinions are reported at 681 F.3d 139 (reproduced at App. 127a-149a).

[2] On May 24, 2011, Justice Ginsburg had extended the time for filing a certiorari petition to August 5, 2011. App. 153a.

filed on July 30, 2012, and granted on November 9, 2012 (JA100). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act and the Sherman Act are reproduced in the Addendum to this brief.

STATEMENT

The Federal Arbitration Act's ("FAA") core mandate is to require enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. Twice in its last three Terms, this Court has made clear that that mandate requires courts to enforce arbitration agreements even when they call for bilateral rather than classwide proceedings. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), this Court held that the FAA prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures. Then, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that the FAA precludes courts from "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744, 1748.

The decision below conflicts with this Court's repeated holdings. In the Second Circuit, bilateral arbitration agreements will not be enforced if the court concludes that the predicted costs of pursuing a federal statutory claim, including costs that would be incurred in litigation as well as arbitration, would exceed the plaintiff's expected recovery. *See* App. 27a-29a. In creating this sweeping, unwritten exception to the FAA's statutory command, the panel: (1) departed from this Court's well-settled

and longstanding FAA precedents; (2) misconstrued this Court's holding in *Concepcion*, which rejected a materially indistinguishable California state-law rule that prohibited enforcement of arbitration agreements that did not permit classwide arbitration; and (3) engrafted onto the FAA a pro-class-action public policy that has no basis in that Act.

The panel reasoned that its approach was justified in order to ensure the "vindication of [federal] statutory rights." *E.g.*, App. 16a (internal quotations omitted). This Court has never endorsed any such rationale for limiting the FAA's plain command, and it should not do so now. Allowing courts to refuse to enforce arbitration agreements based on vague and manipulable concerns about the effectiveness of the arbitral forum in particular cases would be inconsistent with this Court's previous teachings. The Court should instead reaffirm that, absent express limitation by Congress on the arbitration of a federal statutory claim, there is no basis for courts to refuse to enforce the FAA's command that arbitration agreements be enforced according to their terms.

A. Statutory Background

1. The Federal Arbitration Act

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA embodies a "liberal federal policy favoring arbitration agreements," *id.* at 25 (internal quotations omitted), and requiring state and federal courts to enforce arbitration agreements "in accordance with the terms of the agreement," 9 U.S.C. § 4; *see Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989).

FAA § 2, the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "That provision creates substantive federal law regarding the enforceability of arbitration agreements," requiring courts "to place such agreements upon the same footing as other contracts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (internal quotations omitted); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008). The last clause of § 2 preserves the ability of States to apply "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" to the enforcement of arbitration agreements, but it precludes application of any state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

FAA §§ 3 and 4 implement § 2's substantive pro-arbitration policy. Section 3 requires courts to stay litigation of arbitrable claims so that arbitration may proceed "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. § 3. Section 4 provides that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement for arbitration or the failure to comply therewith" are called into question. *Id.* § 4.

Congress enacted the FAA based on findings that bilateral arbitration between a single claimant and a single defendant would benefit individuals and busi-

nesses alike by reducing the expense, delay, and uncertainties associated with court litigation. *See, e.g.*, S. Rep. No. 68-536, at 3 (1924) (noting that avoiding burdensome litigation would benefit "big business and little business alike," as well as "corporate interests" and "individuals"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (Congress "had the needs of consumers, as well as others, in mind").

"[C]lass arbitration was not . . . envisioned by Congress when it passed the FAA in 1925." *Concepcion*, 131 S. Ct. at 1751. Indeed, Congress passed the FAA before the enactment of the Federal Rules of Civil Procedure in 1938, at a time when class actions were permitted only in suits in equity, not in suits at law for monetary relief. *See* 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1:9, at 32 (4th ed. 2002); 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751, at 13-16 & n.14 (3d ed. 2005). Classwide arbitration did not emerge until the 1980s, when California state courts began an experimental program of engrafting onto arbitration agreements classwide procedures analogous to the 1966 revisions to Rule 23.[3]

The FAA's pro-arbitration policy applies with full force to federal statutory claims, unless "Congress itself has evinced an intention to preclude" arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-*

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[3] *See Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301, 309 (2004) (stating that *Keating* launched an "experimental state program regarding the combination of class actions and arbitration").

Plymouth, Inc., 473 U.S. 614, 628 (1985) (holding that claims under the Sherman Act are arbitrable). Although this Court's earlier precedents held arbitration incompatible with federal substantive statutes, *see Wilko v. Swan*, 346 U.S. 427, 434-38 (1953), this Court has long overruled those cases as reflecting the very "judicial hostility to arbitration" the FAA was intended to eliminate. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989) (overruling *Wilko*) (internal quotations omitted).

2. The Sherman and Clayton Acts

Congress enacted the Sherman Act in 1890 to protect competition essential to a properly functioning free market. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997). Congress recognized that competition benefits consumers through lower prices, and it created a private right of action, which authorized treble damages and attorneys' fees, by which consumers could enforce the Act. *See* Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210. But Congress declined to create a class-action mechanism for private antitrust claims, at a time when class actions otherwise were unavailable in damages actions.

Specifically, Senator James Z. George of Mississippi proposed "an amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs but damages would be assessed to each individually." Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 25 (1989). In support of the amendment, Senator George argued that individual lawsuits would be ineffectual in vindicating small claims:

> It is manifest that in nearly every instance the damage by the advanced price of each article

> affected by these combinations would be – though in the aggregate large, indeed – so small as not to justify the expense and trouble of a suit in a distant court.

Id. at 24-25. Other such comments abounded. *See id.* at 25-26 & n.78, 47-48 & nn.185-86.

Congress ultimately rejected Senator George's amendment and declined to adopt a class-action mechanism to address the problem of small claims. *See id.* at 25; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting that the Congress "rejected a proposal to allow a group of consumers to bring a collective action as a class").

Instead of promoting consumer class actions, the Congress relied on the ability of competitors and the federal government to enforce federal law. "[N]o one doubted that competitor lawsuits would work." Hovenkamp, 88 Mich. L. Rev. at 26. Moreover, Congress emphasized "the power of the United States government to bring suit" under § 4 of the Sherman Act. *See id.* at 26 & n.81; 15 U.S.C. § 4 (authorizing the government to bring suits for injunctive relief).

Likewise, when Congress enacted the Clayton Act in 1914, it extended the Sherman Act's private right of action to all of the antitrust laws, but it did not adopt any private class-action enforcement mechanism. *See* Hovenkamp, 88 Mich. L. Rev. at 27; 15 U.S.C. § 15.

B. Proceedings Below

1. Plaintiffs' Complaint

The named plaintiffs in these consolidated cases are retail businesses that, unlike many businesses in the United States, voluntarily chose to accept American Express cards for purchases. Most of these

businesses have annual revenues between $5 million and $40 million. *See* Pet'rs C.A. Br. 5 n.1 (Nov. 1, 2006).

Each named plaintiff entered into a written Card Acceptance Agreement (the "Agreement") with American Express that contains a provision requiring bilateral rather than class arbitration (sometimes referred to as a "class-arbitration waiver"). C.A. App. A156; *see* App. 8a-9a. The arbitration provision is "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*)." C.A. App. A156; *see* App. 67a.

The gravamen of plaintiffs' complaint is that American Express's "Honor All Cards" policy, which requires merchants that wish to accept American Express cards to accept American Express's charge cards as well as its credit cards, constitutes an unlawful tying arrangement under § 1 of the Sherman Act.[4] The named plaintiffs seek to bring suit on behalf of "all merchants that have accepted American Express charge cards." App. 4a.

2. Proceedings in the District Court

American Express moved to compel arbitration. Plaintiffs did not dispute that the arbitration clause in the Agreement covers their antitrust claims. Plaintiffs argued, however, that under *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), the arbitration agreement's class-action waiver precluded them from "'effectively vindicating

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[4] A charge card generally "requires its holder to pay the full outstanding balance at the end of a standard billing cycle," while a credit card, though it can be paid in full at the end of each billing cycle, also "allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges." App. 102a n.6.

[their] federal statutory rights in the arbitral forum'" because each plaintiff would face "costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5,000." App. 111a (quoting *Randolph*, 531 U.S. at 90).

The district court granted the motion to compel arbitration and dismissed plaintiffs' lawsuits. The court rejected plaintiffs' "prohibitive costs" argument, holding that *Randolph* related only to "*costs which would not be incurred in a judicial forum.*" *Id.* Because the costs plaintiffs identified – expert and attorneys' fees – would be incurred whether in court or in arbitration, the court held that they provided no basis to avoid arbitration.

3. *Amex I*

In *Amex I*, the Second Circuit reversed. The panel concluded that the class-action waiver provision in the parties' arbitration agreement was invalid under the "federal substantive law of arbitrability" – i.e., the body of judicial decisions interpreting FAA § 2. App. 77a-78a (internal quotations omitted).[5]

The Second Circuit panel dismissed as inapplicable this Court's holdings that arbitration clauses are enforceable under the FAA "'"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."'" App. 81a (quoting *Gilmer*, 500 U.S. at 26, quoting in turn *Mitsubishi*, 473 U.S. at 628). *Gilmer*, in particular, had rejected the plaintiff's argument that "'arbitration procedures cannot adequately further

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[5] All parties agreed for purposes of this litigation that the enforceability of the arbitration agreement, including the provision requiring individual arbitration, could be appropriately decided by the court, not the arbitrator. *See* App. 75a-77a.

the purposes of the [Age Discrimination in Employment Act of 1967 ("ADEA")] because they do not provide for broad equitable relief *and class actions*.'" *Id.* (quoting *Gilmer*, 500 U.S. at 32) (emphasis added).

Instead of following this Court's longstanding FAA holdings, the panel invoked *dicta* from two cases that it claimed were "somewhat closer to th[e] issue" presented. App. 84a. First, the panel construed language in *Randolph* that "'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum'" to license federal courts to strike down class-action waivers anytime an individual claimant can show that the anticipated costs of pursuing its claim would exceed the amount of its expected recovery, regardless of the fact that such costs would be incurred whether the claim proceeded in litigation or arbitration. App. 84a, 86a (quoting *Randolph*, 531 U.S. at 90).

The panel then concluded, based on an affidavit by plaintiffs' paid litigation-costs expert, that expert witness fees would be "at least several hundred thousand dollars, and might exceed $1 million" – far higher than the average plaintiff's anticipated recovery ($5,000). App. 89a. Moreover, the panel said, "[e]ven with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." App. 91a. The panel thus concluded that *Randolph*'s "prohibitive costs" *dicta* governed because plaintiffs' "claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." App. 93a.

Second, the panel invoked *dicta* from this Court's opinion in *Mitsubishi* suggesting that a "choice-of-law" clause that functioned as a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" might be void "against public policy." 473 U.S. at 637 n.19. The panel reasoned that provisions prohibiting class arbitration constitute such a "prospective waiver" anytime the costs of pursuing an individual claim, "whether in federal court or in arbitration," exceed the anticipated recovery for each plaintiff. App. 93a-94a. After invalidating the class-action waiver, the panel remanded the matter to allow American Express the opportunity to withdraw its motion to compel arbitration. App. 98a-99a.

4. This Court's GVR

This Court granted certiorari, vacated *Amex I*, and remanded for further consideration in light of *Stolt-Nielsen*. In *Stolt-Nielsen*, as in this case, the plaintiff sought to bring a class action alleging violations of the Sherman Act. 130 S. Ct. at 1765. The defendants sought to compel arbitration on the basis of the parties' contract, which the parties stipulated was "silent" on the availability of class arbitration. *Id.* at 1766. The arbitral panel permitted class-arbitration proceedings, accepting the plaintiff's argument that class arbitration was beneficial as a policy matter because the "vast majority" of plaintiffs had "negative value claims" that cost more to litigate than the claimant could expect to recover. *Id.* at 1770 n.7 (internal quotations omitted); *see also id.* at 1777 n.3 (Ginsburg, J., dissenting) (describing plaintiff's argument to the arbitrators that "[a]n antitrust case, particularly involving an international cartel[,] . . . is extraordinarily difficult and expensive to litigate")

(internal quotations omitted; second and third alterations in original).

This Court held that the arbitral panel had "exceeded its powers" and vacated the arbitral award under FAA § 10(a)(4). *Id.* at 1770. It held that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775. Thus, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1773, 1775. This Court also expressly rejected the arbitral panel's justification that class proceedings were necessary given the plaintiff's "negative value claims," describing it as an impermissible effort by the panel "to impose its own view of sound policy regarding class arbitration." *Id.* at 1767-68, 1770 & n.7 (internal quotations omitted).

5. *Amex II*

On remand, American Express argued that *Stolt-Nielsen* required enforcement of the parties' arbitration agreement *a fortiori* because it was not simply "silent" on the availability of arbitration, but expressly refused to authorize it. American Express also argued that the Court's rejection of the arbitral panel's "negative value claims" justification for imposing class arbitration foreclosed the very same rationale advanced by plaintiffs here and adopted by the panel below.

Nonetheless, the remaining panel members (Judges Pooler and Sack)[6] again refused to enforce

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[6] Justice Sotomayor was a member of the panel before her elevation to this Court.

the parties' arbitration agreement. The panel construed *Stolt-Nielsen* as a "narrow ruling on contractual construction" that only barred courts from using public policy to engraft a class-arbitration provision onto an otherwise "silent" arbitration agreement. App. 55a (internal quotations omitted). According to the panel, "nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language [in an arbitration agreement] void." *Id.* The panel concluded that, in light of *Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties, *Amex I* had to be *broadened* to invalidate the parties' arbitration agreement in its entirety, not just the class-arbitration waiver provision. App. 54a.

On April 11, 2011, the court stayed its mandate pending American Express's filing of a petition for certiorari.

6. *Amex III*

On April 27, 2011, this Court held in *Concepcion* that the FAA preempts California's *Discover Bank* rule,[7] which California courts had "frequently applied . . . to find arbitration agreements unconscionable" where they did not permit class arbitration. 131 S. Ct. at 1746. The *Discover Bank* rule provided that class-action waivers in arbitration agreements are invalid if (1) "the waiver is found in a consumer contract of adhesion"; (2) "disputes between the contracting parties predictably involve small amounts of damages"; and (3) the plaintiff alleges "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. This Court held the *Discover Bank* rule was preempted, notwithstanding the "saving clause" in

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[7] *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

FAA § 2, because "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1744, 1748.

Concepcion also specifically rejected the argument that the "prohibitive costs" facing plaintiffs with small claims could justify requiring the availability of classwide arbitration procedures as a condition for enforcing an arbitration agreement. *See id.* at 1753. Specifically, the dissenting opinion argued that California courts were entitled to decide whether to enforce prohibitions on class arbitration because "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." *Id.* at 1760 (Breyer, J., dissenting); *see id.* at 1753 (noting dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"). But the majority squarely rejected the dissent's argument as a justification for the *Discover Bank* rule. *See id.*

The Second Circuit *sua sponte* granted rehearing to consider the impact of *Concepcion*. American Express argued that *Concepcion* unequivocally addressed the question the Second Circuit panel had thought left open by *Stolt-Nielsen*, by holding that courts cannot condition the enforcement of arbitration agreements on the availability of class-arbitration proceedings and, moreover, by rejecting the Second Circuit's "prohibitive costs" justification for imposing such a condition.

On February 1, 2012, the panel held that "*Concepcion* does not alter [its] analysis." App. 3a. It

narrowly construed *Concepcion* as merely "offer[ing] a path for analyzing whether a state contract law is preempted by the FAA," whereas its decision rested on "'a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). According to the panel, *Concepcion* and *Stolt-Nielsen* merely stand "for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"; they do not foreclose courts from invalidating arbitration agreements due to the absence of class-arbitration provisions. App. 16a-17a.

Thus, for the third time, the panel held that arbitration agreements providing for bilateral but not class arbitration are "unenforceable" if the claimant can demonstrate that "the cost of . . . individually arbitrating their dispute . . . would be prohibitive," even though the costs at issue would be incurred whether the claim was brought in litigation or arbitration. App. 25a, 28a (internal quotations omitted). The panel reversed the district court and remanded with instructions to deny American Express's motion to compel arbitration. App. 30a.

On May 29, 2012, the Second Circuit denied rehearing *en banc* over the dissenting votes of five circuit judges. *See supra* note 1.

SUMMARY OF ARGUMENT

I.A. The decision below violates this Court's long-standing holding that arbitration agreements must be enforced as written "unless Congress itself has evinced an intention to preclude" the agreement. *Mitsubishi*, 473 U.S. at 628. That principle applies both to parties' decision to arbitrate, as well as to the procedures the parties choose to govern their arbitration. In the context of plaintiffs' antitrust claims, the Second Circuit was not authorized to override the parties' choice of bilateral rather than class arbitration in "the absence of any explicit support for such an exception in either the Sherman Act or the [FAA]." *Id.* at 628-29.

The decision below should be reversed because it is undisputed that nothing in either statute evinces any intention by Congress to preclude agreements to arbitrate on a bilateral basis. Nothing in either statute's text demands class proceedings under any circumstances. Moreover, the history of both statutes forecloses any conclusion that Congress insisted on class procedures, even for modest-value claims. Indeed, when Congress passed the Sherman Act in 1890, at a time when class actions were not available in lawsuits for damages, it specifically rejected a proposed amendment to create a class-action device to facilitate small antitrust claims. Likewise, the concept of class arbitration did not exist when Congress enacted the FAA in 1925.

B. This Court's decision in *Concepcion* confirms that reversal is warranted. *Concepcion* categorically held that "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" – which is precisely what the Second Circuit did here – is "inconsistent with the FAA." 131 S. Ct. at 1744, 1748. Just like the *Discover*

Bank rule held preempted in *Concepcion*, the decision below frustrates the FAA because it requires defendants to accept class arbitration, which lacks the benefits of bilateral arbitration, or else abandon arbitration altogether. Indeed, the decision below undermines bilateral arbitration in even more cases than California's *Discover Bank* rule.

Concepcion also forecloses the "prohibitive costs" or "vindication of statutory rights" rationale adopted by the Second Circuit. That rationale is materially indistinguishable from the one adopted by *Discover Bank* and advocated by the *Concepcion* dissent. But this Court squarely rejected it, holding the *Discover Bank* rule inconsistent with the FAA "even if" "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. *Concepcion*'s holding is consistent with *Stolt-Nielsen*, which rejected the arbitrators' adoption of that same public policy argument in the context of federal antitrust claims. *See* 130 S. Ct. at 1770 n.7.

The Second Circuit's "labored" efforts to "evad[e]" *Concepcion* are meritless. App. 143a (Jacobs, J.). *Concepcion* did not merely hold that courts are prohibited from literally imposing class arbitration on unwilling parties. It explicitly held that conditioning the enforcement of arbitration agreements on the availability of class actions frustrates the FAA no less than actually requiring it. *See* 131 S. Ct. at 1751. Moreover, *Concepcion* held the *Discover Bank* rule preempted in all cases, and it thus cannot be read to be limited to cases involving state-law claims.

II. The Second Circuit panel's "selective quotation from Supreme Court dicta" in *Randolph* and *Mitsubishi* provides no basis for its disregard of *Concepcion*. App. 141a (Jacobs, J.).

A. The argument pressed in *Randolph* was that costs associated with access to the arbitral forum that would not be required to sue in court – e.g., filing fees, arbitrator's fees, and other administrative fees – warranted invalidating the arbitration agreement. *Randolph* found it unnecessary to address that question, given the absence of any record evidence of such costs. Whether or not *Randolph*'s *dicta* would ever suggest the crafting of a judicial exception to enforcement of the FAA, it certainly did not authorize lower courts to invalidate arbitration agreements on the ground that litigation costs generally, as opposed to costs of the arbitral forum, would make it uneconomical to bring a claim. Nor can *Randolph*'s *dicta* be read to authorize courts to invalidate arbitration agreements based on the absence of class procedures, given that the Court expressly declined to address that issue.

B. This Court's "effective vindication" *dicta* in *Mitsubishi* also have no applicability here. The concern addressed in *Mitsubishi* was that arbitrators might refuse to apply substantive American antitrust law to the parties' dispute. That concern is wholly absent here, because it is undisputed that the Sherman Act will govern the parties' arbitration. Moreover, *Mitsubishi*'s *dicta* did not authorize courts to demand class-arbitration procedures on grounds of federal policy. Rather, as this Court's subsequent decisions make clear, as long as the arbitrators will apply federal substantive law, bilateral arbitration of federal claims "satisfies the statutory prescription of civil liability in court." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012).

III. The Second Circuit panel erred in imposing its own pro-class-action policy judgments rather than adhering to Congress's mandate to enforce the

parties' agreement. Respondents' policy concerns are properly addressed to Congress, not the courts. Moreover, the Second Circuit's policy judgment was inappropriately one-sided and therefore betrayed the same judicial hostility toward arbitration that the FAA was designed to eliminate.

A. The Second Circuit ignored the demonstrated benefits of bilateral arbitration in facilitating resolution of claims. Empirical studies bear out Congress's judgment that bilateral arbitration reduces the costs of dispute resolution and thus is particularly beneficial to claimants seeking modest damages. Moreover, arbitration's cost savings benefit consumers and employees in the form of lower prices and higher wages. The Second Circuit erred by assuming, contrary to Congress's judgment, that bilateral arbitration lacked the flexibility to vindicate federal statutory claims in a cost-effective way.

B. At the same time, the Second Circuit focused exclusively on the perceived policy benefits of class proceedings, while ignoring its serious policy disadvantages. Aggregation of claims does not merely allow plaintiffs to share costs. As Congress and this Court have repeatedly stated, aggregation also can distort the underlying substantive law by creating hydraulic pressure to settle even meritless claims. *See infra* pp. 30-31, 53-55. It is Congress's prerogative to weigh these policy considerations and limit bilateral arbitration where it deems appropriate. It indisputably has not done so here. The Second Circuit exceeded its proper role under the FAA by invalidating the parties' arbitration agreement on the basis of its own one-sided policy preferences.

ARGUMENT

I. THE DECISION BELOW VIOLATES THE FAA'S CORE MANDATE THAT ARBITRATION AGREEMENTS BE ENFORCED IN ACCORDANCE WITH THEIR TERMS

A. The Second Circuit Ignored the FAA's Requirement That the Parties' Choice of Arbitration Procedures Be Enforced Unless Congress Has Precluded Them

1. This Court should reverse the decision below because it is "incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements." App. 141a (Jacobs, J.). The Second Circuit's invalidation of the parties' arbitration agreement on the basis of their decision to forgo class proceedings violates what this Court has repeatedly described as "the central or 'primary' purpose of the FAA": "to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt*, 489 U.S. at 479).

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (internal quotations omitted). "[T]he FAA lets parties tailor . . . many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Parties that choose an arbitral forum do so principally to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informal-

ity, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. Thus, the parties' freedom to fashion their own arbitration agreements includes not only the ability to define "by contract the issues which they will arbitrate," but also the right to delineate the procedural "rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. For example, the parties are free to waive their right to a jury trial, or to the application of the Federal Rules of Evidence, in exchange for the "relative informality of arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (holding that such informality is "not a basis for finding the forum somehow inadequate"); *see Concepcion*, 131 S. Ct. at 1747 (stating that courts may not override parties' choice to waive jury trial or the Federal Rules of Evidence).

The parties' choice to pursue bilateral rather than class arbitration is precisely the type of procedural decision that the FAA leaves in the hands of the parties. That choice does not affect the scope of the parties' substantive remedies; it "affect[s] only the procedural means by which the remedy may be pursued." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010); *accord id.* at 1443 (plurality) (calling it "obvious" that class procedures "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed"). Accordingly, when parties specify "*with whom* they choose to arbitrate their disputes" – in this case, by providing for arbitration solely on a bilateral basis – the FAA requires that courts enforce the parties' choice in accordance with the terms of the agreement. *Stolt-Nielsen*, 130 S. Ct. at 1774-75; *see also Concepcion*, 131 S. Ct. at 1749; *EEOC v. Waffle House, Inc.*, 534

U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement.") (emphasis added). Indeed, as this Court observed in *Concepcion*, the choice between bilateral and class arbitration is a "'fundamental'" one due to the stark differences between those two procedures for dispute resolution. 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776); *see infra* pp. 29-31.

The FAA forbids courts or arbitrators from overriding the parties' choice of bilateral rather than class procedures based merely on "judicial policy concern" about the effectiveness of arbitration. *Pyett*, 556 U.S. at 270; *see also Stolt-Nielsen*, 130 S. Ct. at 1769 (holding that arbitrators also may not impose their "own conception of sound policy"). Rather, arbitration agreements must be enforced by their terms "*unless Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628 (emphasis added); *accord Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (FAA "mandates enforcement of agreements to arbitrate statutory claims," unless the mandate is "overridden by a contrary congressional command"). Thus, here, the FAA required that parties' procedural choice to pursue bilateral rather than class arbitration be enforced absent evidence in either the FAA or the Sherman Act that Congress intended to preclude that choice.

2. The Second Circuit panel disregarded these basic principles. It erred in invalidating the parties' agreement because nothing in either the FAA or the Sherman Act evinces any intent by Congress to

preclude parties from agreeing not to pursue class proceedings. Congress's core purpose in enacting the FAA was to promote *bilateral* arbitration, not class arbitration, as a means to facilitate cost-effective resolution of individual claims – including, specifically, claims asserting modest damages. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasizing the importance of bilateral arbitration to employment disputes, which "often involve[] smaller sums of money"); *see also supra* pp. 4-5 (discussing FAA's purposes).

Congress did not even contemplate class arbitration when it enacted the FAA in 1925. *See Concepcion*, 131 S. Ct. at 1751. Class arbitration was a judicial innovation of the California state courts in the early 1980s – more than half a century later. *See supra* note 3. Moreover, Congress enacted the FAA against the backdrop of a pre-Federal Rules regime in which class actions for damages were not permitted in suits at law. Given that class-arbitration procedures were not even envisioned by Congress when it enacted the FAA, the Act cannot reasonably be interpreted to preclude parties from forgoing class-arbitration proceedings. *See supra* p. 5.

Nor does the Sherman Act reflect any congressional intent to preclude agreements to arbitrate antitrust claims on a bilateral basis. Like the FAA, nothing in the Sherman Act's text precludes parties from forgoing class arbitration. *See CompuCredit*, 132 S. Ct. at 673 (holding that "the FAA requires the arbitration agreement to be enforced according to its terms" if the federal statute is "silent on whether claims under the Act can proceed in an arbitrable forum"); *cf. Gilmer*, 500 U.S. at 32 ("*[E]ven if the arbitration could not go forward as a class action*

or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.") (internal quotations omitted; emphasis added; second alteration in original).

The Sherman Act's history, moreover, belies any intent to insist on class arbitration. Like the FAA, the Sherman Act was passed before the Federal Rules made class actions available in damages suits. As discussed above, moreover, Congress rejected a proposal to adopt a class-action mechanism to address the problem of small-damages antitrust claims. *See supra* pp. 6-7. The Sherman Act thus reflects a judgment that the inability of some consumers to bring small-damages claims would not undermine the effective vindication of the Sherman Act's policies, in light of other enforcement mechanisms such as competitor lawsuits and government enforcement. Given that Congress rejected class proceedings, even in the context of claims involving small damages, it certainly could not have intended to preclude parties from agreeing contractually to forgo class proceedings.

The Second Circuit viewed the parties' bilateral arbitration agreement as incompatible with the Sherman Act because it equated bilateral arbitration with the waiver of *substantive* relief under the Act. App. 27a. As discussed below, that premise itself discriminates against arbitration, because it assumes, contrary to Congress's judgment and this Court's decisions, that bilateral arbitration is incapable of "properly handl[ing] an antitrust matter" and "keep[ing] the effort and expense required to resolve a dispute

within manageable bounds." *Mitsubishi*, 473 U.S. at 633-34; *see infra* pp. 49-53.

Moreover, in equating the choice of bilateral arbitration with the waiver of substantive antitrust remedies, the Second Circuit panel ignored what this Court has recognized as the fundamental difference between eliminating liability and changing the procedures by which liability is enforced. The Court's opinion in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), is instructive. There, the arbitration clause in a maritime contract between the parties (a shipper and the owner of cargo damaged on the ship) provided for arbitration to occur in Japan. The Carriage of Goods by Sea Act ("COGSA"), which governs the rights and duties of shippers and cargo owners, provides that "[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage . . . or lessening such liability . . . shall be null and void and of no effect." 46 U.S.C. app. § 1303(8) (1994). The cargo owner in *Vimar Seguros* resisted enforcement of the arbitration agreement under the FAA on the ground that the "inconvenience and costs of proceeding in Japan would 'lesse[n] . . . liability' as those terms are used in COGSA." 515 U.S. at 532 (alterations in original); *see id.* at 533 ("The first [argument] is that a foreign arbitration clause lessens COGSA liability by increasing the transaction costs of obtaining relief.").

This Court rejected that argument. It held that COGSA did not preclude selection of a foreign arbitral forum and that there was therefore no conflict between COGSA and the FAA. COGSA, the Court held, "addresses the lessening of the specific liability imposed by the Act, without addressing the separate

question of the means and costs of enforcing that liability." *Id.* at 534. "The difference," the Court said, "is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated." *Id.* Thus, it held enforcement of the arbitration agreement under the FAA fully consistent with COGSA. *See id.* at 541 ("[T]he FAA and COGSA may be given full effect."); *see also CompuCredit*, 132 S. Ct. at 671 (distinguishing between procedural choices and substantive guarantees – "*the guarantee of the legal power to impose liability*"); *Pyett*, 556 U.S. at 265-66 (distinguishing "a prospective waiver of the substantive right" from a waiver of the procedural right to proceed in court).

The distinction between procedural choices and substantive remedies is critical to the FAA's mandate that parties be "free to structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 57 (internal quotations omitted). "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445 (1946); *accord Shady Grove*, 130 S. Ct. at 1442 (plurality) (noting that "most procedural rules" "affect[] a litigant's substantive rights" in the sense that they change "the manner and the means by which the litigants' rights are enforced") (internal quotations omitted). But "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [party]." *Vimar Seguros*, 515 U.S. at 536.

The distinction between substantive liability and procedures for dispute resolution is dispositive of this case: the parties' arbitration agreement here did not purport to lessen American Express's liability under the Sherman Act or any substantive laws. It merely changed "the procedure for enforcing them." *Id.* at 534; *see also Shady Grove*, 130 S. Ct. at 1439 (holding that class actions do not affect a party's remedies, but only "the procedural means by which the remedy may be pursued"). And nothing in the FAA or the Sherman Act "suggests that the statute prevents the parties from agreeing to enforce [its] obligations in a particular forum" or that it requires particular "mechanisms for their enforcement." *Vimar Seguros*, 515 U.S. at 535. Thus, under this Court's settled precedents, the Second Circuit was required to enforce the parties' arbitration agreement, including its provision for bilateral rather than classwide procedures, "in accordance with the terms of the agreement." 9 U.S.C. § 4.

B. The Second Circuit's Decision Contravenes *Concepcion*

Concepcion dictates reversal here because, consistent with this Court's FAA jurisprudence, it forbade courts from doing exactly what the Second Circuit panel did here – refuse to enforce an arbitration agreement on the ground that it precluded classwide arbitration procedures. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012) (recognizing that *Concepcion* "is broadly written" to preclude courts from "'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures'") (quoting 131 S. Ct. at 1744). The Second Circuit's efforts to distinguish *Concepcion* were, as Chief Judge Jacobs stated in his dissent from

denial of rehearing *in banc*, legal contortions designed to "evad[e] the broad language and clear import" of this Court's decision. App. 143a.

1. The decision below is incompatible with *Concepcion*. The question in *Concepcion* was whether the FAA allows state courts to "condition[] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. The Court unambiguously held that it does not: such a condition "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. As a result, it held that California's *Discover Bank* rule, which California courts had "frequently applied . . . to find arbitration agreements unconscionable" where such agreements precluded class arbitration, conflicted with, and was therefore preempted by, the FAA. *Id.* at 1746. In doing so, it held that the *Discover Bank* rule was not spared from preemption by § 2's "saving clause" because that clause did not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748.

This Court's holding in *Concepcion* requires reversal of the decision below. That holding was rooted in conflict preemption – the conclusion that the *Discover Bank* rule, by "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures," "[stood] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1744, 1748. The Court's conflict preemption holding leads inescapably to the conclusion that the FAA also precludes *federal* courts from crafting a judge-made rule that interferes with the Act's objectives in the same way. Because the decision below, just like the *Discover Bank* rule, "condition[s] the enforce-

ability of certain arbitration agreements on the availability of classwide arbitration procedures," it is "inconsistent with the FAA" and thus cannot be a proper interpretation of its pro-arbitration provisions. *Id.*

The Second Circuit panel asserted that its rule was authorized by the "federal substantive law of arbitrability" as a means of assuring that the plaintiff in a particular case could "vindicat[e] [its] statutory rights." App. 16a (internal quotations omitted). But the "federal substantive law of arbitrability" is simply the "body of federal substantive law" interpreting and effectuating FAA § 2, the statute's "primary substantive provision"; and nothing in that body of law suggests that it is appropriate for courts to create *exceptions* to the FAA based on their view of the policy of other federal laws. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *see also* App. 77a-78a. The "federal substantive law of arbitrability" does not allow courts to promulgate judge-made rules that *frustrate* the FAA's purposes, on the theory that doing so might advance the purpose of some other federal law. *See Concepcion*, 131 S. Ct. at 1748 (FAA cannot be interpreted so as "to destroy itself") (internal quotations omitted). On the contrary, just as *Concepcion* held that the FAA preempts state-law rules that insist on class arbitration as a condition of enforcement, any judicially crafted parallel federal rule likewise is contrary to the "federal substantive law of arbitrability."

The holding of the court below interferes with the FAA's policies in the same way as the *Discover Bank* rule held preempted in *Concepcion*. As this Court observed in *Concepcion*, the choice between bilateral and class arbitration is a "'fundamental'" one due to

the stark differences between those two procedures for dispute resolution. 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. "[B]efore an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* "And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties." *Id.* at 1750.

Further, "[c]lasswide arbitration includes absent parties, necessitating additional and different procedures." *Id.* "Confidentiality becomes more difficult" because of the need for notice to absent class members. *Id.* Due process also requires that absent class members be given "an opportunity to be heard, and a right to opt out of the class." *Id.* at 1751.

Class arbitration also "greatly increases risks to defendants" because the absence of judicial review "makes it more likely that errors will go uncorrected." *Id.* at 1752. While parties may agree to accept that risk in exchange for the lower costs and increased efficiency of arbitration in the context of an individual dispute, that risk of error "will often become unacceptable" to the parties when "damages allegedly owed to tens of thousands of potential

claimants are aggregated and decided at once." *Id.* "Faced with even a small chance of a devastating loss, defendants will be pressured into . . . 'in terrorem' settlements" of even meritless claims. *Id.*; *see also Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

As a result of these fundamental differences, insistence on class arbitration as a condition to enforcing the parties' arbitration agreement interferes with the FAA because it "will have a substantial deterrent effect on incentives to arbitrate." *Concepcion*, 131 S. Ct. at 1752 n.8. Indeed, faced with the unbargained-for choice between accepting class procedures in arbitration and defending class-action litigation in court, defendants predictably will abandon arbitration altogether. Real-world experience proves that this deterrent effect is severe.[8]

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[8] For example, in light of *Discover Bank*, certain corporations abandoned arbitration for California residents altogether. *See* Br. for Pet'rs 55-56, *Concepcion*, No. 09-893 (U.S. filed Aug. 2, 2010), 2010 WL 3017755 (citing Comcast residential services agreement); Verizon Wireless Customer Agreement, *at* http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp ("**If for some reason the prohibition on class arbitrations . . . cannot be enforced, then the agreement to arbitrate will not apply.**"). After *Concepcion*, Comcast resumed agreeing to arbitrate with California residents. *See* http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html.

In fact, the Second Circuit's rule interferes with the FAA even more than the *Discover Bank* rule held preempted in *Concepcion*, because it would lead to the invalidation of far more arbitration agreements. The *Discover Bank* rule was limited to circumstances: (1) where "'the waiver is found in a consumer contract of adhesion'"; (2) "'in a setting in which disputes between the contracting parties predictably involve small amounts of damages'"; and (3) "'when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'" *Id.* at 1746 (quoting *Discover Bank*, 113 P.3d at 1110).

As to the second factor, this Court noted – with evident skepticism – that courts had deemed individual claims as large as $4,000 sufficiently "small" to satisfy *Discover Bank*. *Id.* at 1750 (calling the small-damages limitation "toothless" and "malleable"). By contrast, the Second Circuit here found that respondents' claims were prohibitively expensive because the cost of an expert economist's antitrust study would be "at least several hundred thousand dollars," and maybe even more than $1 million. App. 89a. The Second Circuit apparently would deem any individual claim asserting damages less than that amount uneconomical, thus effectively precluding bilateral arbitration of all but the most massive individual antitrust claims.

Beyond antitrust cases, litigation of all kinds often is costly, and it is all too easy for plaintiffs' lawyers to "avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss." App. 137a (Jacobs, J.). Indeed, at least one plaintiffs' organi-

zation has posted a model expert affidavit on its website, to be used as a boilerplate for claimants trying to evade bilateral arbitration agreements. *See* Public Justice, *Helpful Post-Concepcion court rulings, at* http://publicjustice.net/case-documents/concepcion (visited Dec. 3, 2012).

Moreover, the Second Circuit did not require a showing that "the waiver [was] found in a consumer contract of adhesion" or that American Express had "superior bargaining power" and "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 113 P.3d at 1110. Rather, the Second Circuit's rule allows any plaintiff, no matter how sophisticated or well-funded, to invalidate bilateral arbitration agreements in any contract, no matter how even-handed its terms. The Second Circuit's reasoning thus will enable the invalidation of bilateral arbitration for a vast number of claims.

The decision below also undermines the key benefits of *all* arbitration agreements – even those that withstand challenge – by turning the threshold arbitrability question into a detailed inquiry into the merits. Under the decision below, any arbitration in which plaintiffs seek class treatment will be subject to protracted proceedings in district court and "be litigated there on the merits in many critical respects." App. 139a (Jacobs, J.). As Chief Judge Jacobs recognized, the "economic feasib[ility]" of an individual claim cannot be assessed "[w]ithout a close inquiry into the merits" of the claim. App. 138a-139a (internal quotations omitted). For example, "[w]hether a dispute may require expert testimony is a question inseparable from the merits (and raises *Daubert* and other vexed questions)." App. 139a. Nor can the

feasibility of a claim be assessed without delving into "such prior questions as the statute of limitations and laches, controlling law, [and] res judicata, . . . not to mention . . . whether the putative class is duly constituted and properly represented, without which there is no class claim." *Id.* Thus,

> [e]ven if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. . . . The predictable upshot is that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes.

App. 139a-140a; *accord Vimar Seguros*, 515 U.S. at 533.

In sum, "*Amex III* is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause." App. 137a (Jacobs, J.). Given that the Second Circuit's rule would frustrate the FAA's core purposes in a broader range of cases than the *Discover Bank* rule, the decision below cannot be a proper interpretation of the FAA in light of *Concepcion*.

2. *Concepcion* also squarely rejected the Second Circuit panel's "prohibitive costs" or "vindication of rights" justification for conditioning enforcement of arbitration agreements on the availability of class-wide arbitration procedures. As noted above, the dissenting opinion in *Concepcion* made the same argument urged by respondents and accepted by the panel below: that the *Discover Bank* rule was justified because "class proceedings are necessary to prosecute small-dollar claims that might otherwise

slip through the legal system." 131 S. Ct. at 1753.[9] The dissent's argument echoed the California Supreme Court's decision in *Discover Bank*, which reasoned that class actions are "inextricably linked to the vindication of substantive rights," and thus class-arbitration waivers are unconscionable "to the extent they operate to insulate a party from liability." 113 P.3d at 1109. But this Court specifically rejected the dissent's argument, because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. This Court also rejected the argument that California's "policy against exculpation" justified the *Discover Bank* rule. *Id.* at 1746.

The Court in *Concepcion* also noted that the plaintiffs' claims in that case were "most unlikely to go unresolved" because of particular provisions of AT&T's arbitration clause. *Id.* at 1753. But that observation did not limit the Court's unequivocal holding. The previous sentence of the Court's opinion is clear: the FAA precludes conditioning enforcement of arbitration provisions on the availability of class proceedings, "*even if* [class arbitration] is desirable for unrelated reasons." *Id.* (emphasis added). Moreover, that unequivocal reading is the only sensible one given the Court's categorical declaration in the ensuing paragraph that the *Discover Bank* rule is "preempted by the FAA" in *all* of its applications. *Id.* If the Court had agreed with the dissent's policy argument – that bilateral arbitration is *consistent* with the FAA only in cases where it is "unlikely" that claims will "slip through the legal

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[9] *See Concepcion*, 131 S. Ct. at 1760-61 (Breyer, J., dissenting).

system" – it would necessarily have held the *Discover Bank* rule preempted only in those cases. It did not.

Concepcion's unqualified rejection of the dissent's policy arguments is bolstered by *Stolt-Nielsen*, which also rejected the same policy arguments – significantly, in the context of Sherman Act claims. There, the arbitral panel permitted class arbitration despite the absence of any agreement by the parties, in part because it viewed class proceedings as necessary given that AnimalFeeds itself and "the 'vast majority' of the claimants against [Stolt-Nielsen] 'ha[d] negative value claims meaning it costs more to litigate than you would get if you won.'" 130 S. Ct. at 1770 n.7 (ellipsis omitted). This Court rejected that argument, holding that the arbitral panel "exceeded its powers" under FAA § 10(a)(4) by "impos[ing] its own policy choice" rather than enforcing the terms of the parties' agreement. *Id.* at 1770; *see also id.* at 1767 (noting that vacatur of an arbitral award under § 10(a)(4) is appropriate "only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice") (internal quotations and alterations omitted).

Concepcion and *Stolt-Nielsen* thus make clear that, whatever the policy arguments in favor of class arbitration in reducing the transaction costs of claims (whether based on state law, as in *Concepcion*, or federal law, as in *Stolt-Nielsen*), the FAA precludes courts from using those policy considerations to condition the enforceability of arbitration agreements on the availability of a fundamentally different procedure to which the parties never agreed.

3. The Second Circuit panel gave two reasons for refusing to apply *Concepcion* as controlling precedent in this case. Neither has merit.

First, the panel construed *Concepcion* as standing only "for the principle that parties cannot be *forced* to arbitrate disputes in a class-action arbitration." App. 16a-18a (emphasis added). In the panel's view, the invalidation of the parties' arbitration clause did not run afoul of *Concepcion* because it did not "order[] the parties to participate in class arbitration." App. 17a.

That interpretation of *Concepcion* is at odds with the plain language of this Court's decision. *See* App. 143a (Jacobs, J.) (stating that the panel "evad[ed] the broad language and clear import" of *Concepcion*). This *Concepcion* Court stated in no uncertain terms that the *Discover Bank* rule was preempted even though it "does not *require* classwide arbitration." 131 S. Ct. at 1750. As this Court explained, conditioning the enforceability of arbitration agreements on the availability of class arbitration frustrates the FAA's core purposes no less than actually requiring class arbitration, because it allows plaintiffs to insist on class arbitration *ex post*. *See id.* Any such *ex post* demand predictably will lead defendants to forgo arbitration altogether because of the "fundamental" "changes brought about by the shift from bilateral arbitration to class-action arbitration." *Id.* (internal quotations omitted). Plainly, *Concepcion* not only precludes rules that literally compel parties to engage in class arbitration but also forecloses the outcome the panel reached here – refusing to enforce an arbitration agreement because it does not permit classwide arbitration. *See id.* at 1744. Either way,

the courts are improperly refusing to enforce the parties' own agreement.

Second, the panel said that *Concepcion* addressed solely "whether a state contract law is preempted by the FAA" and did not affect the panel's "'vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). As Chief Judge Jacobs noted, that "labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded." App. 143a. While *Concepcion* addressed preemption because it dealt with a state-law rule, its holding – that conditioning the enforceability of arbitration agreements on the availability of arbitration is "inconsistent with the FAA," 131 S. Ct. at 1748 – rested on an interpretation of FAA § 2. That same interpretation governs the "federal substantive law of arbitrability," which is just the body of law implementing § 2.[10] Thus, *Concepcion*'s holding that the FAA preempts California's *Discover Bank* rule forecloses lower courts from interpreting the "federal substantive law of arbitrability" to achieve a result that is equally "inconsistent with the FAA." *Id.*; *see supra* pp. 28-29.

The panel appeared to conclude that *Concepcion* simply does not apply where a plaintiff asserts federal-law rather than state-law claims. App. 16a. But that distinction finds no basis in *Concepcion*. Nowhere did this Court suggest that its holding was

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[10] *See also* App. 55a (recognizing, prior to *Concepcion*, that *Amex II* was just a "different iteration" of the Second Circuit's state-law unconscionability holding in *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010), which *Concepcion* abrogated in *Affiliated Computer Services, Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011)).

contingent on the state-law nature of the Concepcions' claims. 131 S. Ct. at 1748. Indeed, the *Discover Bank* rule had been applied to invalidate bilateral arbitration of federal statutory claims, including Sherman Act claims. *See, e.g., In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288 (N.D. Cal. 2008). *Concepcion* was categorical in holding that the *Discover Bank* rule – without limitation – was "inconsistent with the FAA." 131 S. Ct. at 1748; *see also In re Apple & AT&TM Antitrust Litig.*, No. C 07-05152 JW, 2011 WL 6018401, at *4 (N.D. Cal. Dec. 1, 2011) (rejecting plaintiffs' argument that *Concepcion* did not apply to federal antitrust claims and reversing its prior decision not to compel arbitration).

The panel's effort to limit *Concepcion* to state-law claims also contradicts this Court's repeated holdings that the FAA applies with full force to federal statutory claims. This Court reiterated that principle just last Term, holding that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. Accordingly, the FAA "requires courts to enforce agreements to arbitrate according to their terms . . . *even when the claims at issue are federal statutory claims*, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 669 (internal quotations omitted; emphasis added).[11] As discussed above, not only does the Sherman Act lack any such directive, but Congress specifically

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[11] The panel's view that it was at liberty to refuse to enforce an arbitration agreement where it thought that doing so would lead to better "vindication of [federal] statutory rights" (App. 16a (internal quotations omitted)) thus reflects just the same sort of "judicial hostility to arbitration" that this Court sought to eliminate when it overruled *Wilko*. *See supra* p. 6.

rejected a class-action-type mechanism when it enacted the Sherman Act in 1890. The federal nature of respondents' antitrust claims thus provides no justification for the panel's disregard of *Concepcion*.

Finally, the Second Circuit's effort to limit *Concepcion* to state-law claims would lead to absurd and unworkable results. Plaintiffs often bring claims under parallel state and federal statutes, and virtually any complaint can be artfully pled to include at least one federal-law claim. The decision below would lead to enormous inefficiency, by requiring duplicative proceedings in separate forums of state-law and federal-law claims arising out of the same facts. It would be particularly absurd, for example, to refuse to enforce an agreement for bilateral arbitration of a federal antitrust claim while a substantively identical Cartwright Act claim, Cal. Bus. & Prof. Code § 16700 *et seq.*, is subject to bilateral arbitration. The Second Circuit's distinction is not only legally untenable but also practically unworkable.

II. THE SECOND CIRCUIT PANEL DISTORTED THIS COURT'S DECISIONS IN *RANDOLPH* AND *MITSUBISHI*

Rather than follow the plain language of the FAA and this Court's precedents, the panel below relied on "selective quotation from Supreme Court dicta" in *Randolph* and *Mitsubishi*. App. 141a (Jacobs, J.). None of those *dicta* supports the Second Circuit's sweeping new exception to the FAA.

A. This Court's "Prohibitive Costs" *Dicta* in *Randolph* Related Only to the Costs of Access to the Arbitral Forum

First, the panel relied on "distortion of dicta from [*Randolph*]." App. 143a (Jacobs, J.). In *Randolph*, the plaintiff (Randolph) alleged that Green Tree

violated the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, by failing to disclose a $15 charge for "vendor's single interest" insurance on her Truth in Lending statement. 531 U.S. at 83. In resisting arbitration, the plaintiff argued that the agreement's failure to specify which party would bear the costs of arbitration created a "risk" that she would "be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum." *Id.* at 89-90. Reversing the Eleventh Circuit, which had accepted Randolph's argument, this Court held that "the arbitration agreement's silence on the subject [of arbitration costs] ... is plainly insufficient to render it unenforceable." *Id.* at 91.

In *dicta*, *Randolph* commented that "[i]t may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. But *Randolph*'s reference to "large *arbitration* costs" does not support the Second Circuit's decision in this case because it was not a reference to any and all costs, whether in arbitration or litigation. It referred to filing fees, arbitrator's fees, and other administrative fees imposed by the arbitral forum that would not be required to sue in court. *See id.* at 89 (referring to "the costs *of arbitration*") (emphasis added); *id.* at 90 & n.6 (referring to the "filing fee," "arbitrator's fee," and "administrative fees") (internal quotations omitted). The dissenting opinion also shared this understanding of the issue. *See id.* at 93 (Ginsburg, J., concurring in part and dissenting in part) (describing the question raised by plaintiff's challenge as one of "access[]" – i.e., "who pays for the arbitral forum"). So did the court of appeals. *See Randolph v. Green Tree Fin. Corp. – Alabama*, 178

F.3d 1149, 1158 (11th Cir. 1999) (invalidating arbitration agreement based on "filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum").

In other words, *Randolph*'s *dicta* related to the extra "price of admission" that a plaintiff has to pay a private arbitrator that would not be required to sue in court. App. 144a (Jacobs, J.). It did not authorize lower courts to invalidate arbitration agreements, on the ground that litigation costs generally, as distinguished from the specific costs of accessing an arbitral forum, would make it uneconomical to bring an individual claim.[12]

Virtually every other federal circuit has adopted this limited reading of *Randolph*'s "prohibitive costs" *dicta*. Except for the court below, and possibly *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006),[13] every circuit to apply *Randolph* has done so exclusively in analyzing the enforceability of "cost-splitting," "fee-sharing," and other arbitration provisions requiring the plaintiff to pay all or part of the

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[12] Plaintiffs here have never contended – much less demonstrated – they would bear prohibitive filing fees, arbitrators' fees, or other costs to access the arbitral forum that they would not have to bear in court. *See Randolph*, 531 U.S. at 90 & n.6 (dismissing challenge because "record d[id] not show" plaintiff would bear excessive arbitration costs).

[13] *Kristian* referred to *Randolph* in holding that a class-arbitration waiver was unenforceable. In contrast, however, the First Circuit in *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 12, 13 (1st Cir. 2009) (Boudin, J.), described the relevant test as "whether the arbitration regime . . . is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims."

costs *of the arbitral forum*.[14] Likewise, the cases cited by the panel involved exclusively arbitration-specific costs that restrict access to the arbitral forum. *See* App. 146a n.2 (Jacobs, J.) (discussing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *Livingston*, 339 F.3d at 558-59; and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002)).

The Second Circuit's broad reading of *Randolph* also cannot be correct because it would discriminate against arbitration, in violation of the FAA. *See Preston*, 552 U.S. at 356. Even in federal litigation, a plaintiff will often be required to bear costs that exceed its expected recovery. *See Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) ("Our legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses."). Even in such situations, a plaintiff's ability to proceed as part of a class action may be denied under Rule 23.

For example, under Rule 23(b)(3), the need to prove individualized issues frequently precludes claims that involve small damages from proceeding as a

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[14] *See Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 216-17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 553-54 (4th Cir. 2001); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 657-59 (6th Cir. 2003) (en banc); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 566-67 (8th Cir. 2007); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 779-80 (10th Cir. 2010); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258-59 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001).

class action.[15] A plaintiff cannot avoid Rule 23's requirements by claiming he needs it to defray otherwise "prohibitive costs." Yet the Second Circuit never assessed whether respondents' claims here would satisfy Rule 23.[16] Instead, it categorically ruled that arbitration agreements must provide for class proceedings whenever they are necessary to make it economical for a plaintiff to pursue a claim. Because that rule places a unique burden on arbitration that would not obtain in court, it contravenes the FAA.

The procedural history of *Randolph* confirms that the Second Circuit misinterpreted this Court's opinion. As an alternative ground for affirming the Eleventh Circuit's invalidation of the arbitration agreement, Randolph argued that the agreement was unenforceable because it "preclude[d] respondent from bringing her claims under the TILA as a class action." 531 U.S. at 92 n.7. But this Court expressly "decline[d] to reach" that argument because the Eleventh Circuit "did not pass on this question." *Id.*

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[15] *See, e.g., In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (reversing class certification because "market for IPO shares is not efficient" and fraud-on-the-market presumption therefore did not apply); *Vallies v. Sky Bank*, 591 F.3d 152, 158 (3d Cir. 2009) (stating that TILA's "detrimental reliance" requirement "may create obstacles for class certification because of the individualized fact-specific nature of the reliance inquiry").

[16] If respondents' claims cannot be certified as a class action under Rule 23, the parties' waiver of class procedures would provide no basis to deny enforcement of the arbitration agreement. This further demonstrates that the Second Circuit's test is untenable: having to ascertain whether there is a basis for class certification would undermine the advantages of bilateral arbitration by adding another complex, fact-intensive inquiry to the threshold arbitrability test.

Thus, *Randolph* cannot reasonably be read to endorse some lower courts' invalidation of arbitration agreements on the ground that they do not authorize class proceedings.[17]

Moreover, any such reading of *Randolph*'s *dicta* is now squarely foreclosed by *Concepcion*, "which more directly and more recently addresses the issue on appeal in this case." *Coneff*, 673 F.3d at 1159; *see* App. 145a (Jacobs, J.) (*Concepcion* "is more clear and more recent – and authoritative"). In response to the dissent's "prohibitive costs" argument – "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," 131 S. Ct. at 1753 – the majority squarely held that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.*; *accord Stolt-Nielsen*, 130 S. Ct. at 1770 n.7 (rejecting the same policy justification for imposing class arbitration on non-consenting parties). That holding is directly on point here, and it precludes the Second Circuit's tortured reading of *Randolph* to reach the opposite result.

B. This Court's "Effective Vindication" *Dicta* in *Mitsubishi* Related Only to Arbitration Provisions That Threaten To Override U.S. Substantive Law

"Similarly misleading is the panel's quotation of *Mitsubishi*." App. 145a (Jacobs, J.). *Mitsubishi*'s "effective-vindication" comment addressed concerns that the arbitrators would refuse to apply substantive American antitrust law to the parties' dispute.

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[17] *See also Randolph v. Green Tree Fin. Corp. – Alabama*, 244 F.3d 814, 819 (11th Cir. 2001) (rejecting plaintiff's argument on remand).

473 U.S. at 636-37 & n.19. The Second Circuit's effort to stretch that language into a roving license to impose courts' own policy views regarding the "effectiveness" of the parties' chosen procedures for vindicating federal statutory rights violates the FAA and lacks any support in this Court's precedents.

Mitsubishi involved a sales agreement between Mitsubishi and one of its dealers located in Puerto Rico. *Id.* at 616-17. The sales agreement contained an arbitration provision that broadly called for the parties' disputes to be arbitrated before the Japanese Commercial Arbitration Association ("JCAA"). *Id.* at 617. The dealer brought certain counterclaims against Mitsubishi, including (as relevant to this Court's decision) a claim alleging that Mitsubishi had conspired to divide markets in violation of the Sherman Act. *Id.* at 620. Mitsubishi sought to compel arbitration and the dealer resisted. This Court held that the dealer's antitrust claims were arbitrable, and it rejected the dealer's claim that arbitration was incompatible with the federal policies underlying the Sherman Act. *Id.* at 632-40.

In doing so, this Court indicated it believed that the JCAA "should be bound to decide [the parties'] dispute in accord with the national law giving rise to the claim" (i.e., under the Sherman Act). *Id.* at 636-37. In a footnote, the Court noted that the parties' sales agreement contained a choice-of-law clause calling for its provisions to be "governed and construed in all respects according to the laws of the Swiss Confederation." *Id.* at 637 n.19. Certain *amici* raised a concern that the JCAA might interpret this choice-of-law provision to mean that Swiss law, not the Sherman Act, governed the dealer's antitrust claim. *Id.*

In response, this Court said it had "no occasion to speculate on th[e] matter," because Mitsubishi sought only "to enforce the agreement to arbitrate, not to enforce an award." *Id.* The Court "merely note[d]" that if, at the award-enforcement stage, the arbitration clause and the "choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," it would refuse to enforce the agreement based on "public policy." *Id.*

The *Mitsubishi* footnote expresses, at most, concern about a contract that prospectively waives the application of federal *substantive* law to disputes "where it otherwise would apply." *Id.* That concern is nonexistent here, however, because American Express's arbitration agreement with its merchants contains no similar choice-of-law provision that purports to alter the substantive law applicable to the parties' dispute.

Rather, the parties' agreement merely reflects a *procedural* decision to resolve their disputes through bilateral rather than class arbitration. Nothing in *Mitsubishi* remotely suggested that the FAA permits courts to invalidate arbitration agreements based on that kind of procedural choice. Nor did *Mitsubishi* address class arbitration, much less suggest it was necessary to the enforcement of the federal antitrust laws. To the contrary, *Mitsubishi* held that bilateral arbitration of antitrust claims is fully consistent with the policies underlying the federal antitrust laws because of arbitration's "adaptability and access to expertise" as well as the benefits of "streamlined proceedings and expeditious results." *Id.* at 633.

This Court's decision in *Vimar Seguros* confirms that the *Mitsubishi* footnote is properly read as

addressing prospective waivers of federal *substantive* law, not procedural rules such as class procedures. As discussed above, this Court held that the parties' choice of a Japanese forum was a procedural choice that did not lessen COGSA's substantive guarantees. *See supra* pp. 25-26. *Vimar Seguros* also addressed a second argument made by the cargo owners: that "there is no guarantee foreign arbitrators will apply COGSA." 515 U.S. at 539. That objection, this Court said, "raises a concern of substance." *Id.* It was only in connection with that separate argument that the Court invoked footnote 19 of *Mitsubishi*, describing "[t]he relevant question" under that footnote as "whether the *substantive law* to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." *Id.* (emphasis added); *see also Pyett*, 556 U.S. at 273-74 (addressing *Mitsubishi* in context of "substantive waiver of federally protected civil rights").[18]

In sum, the *Mitsubishi* footnote addresses concerns about arbitration agreements that supplant federal law as the substantive rule of liability. It was "misleading" for the Second Circuit panel to read into *Mitsubishi* a license for courts to invalidate arbitration agreements whenever they perceive the parties' agreed-upon arbitration *procedures* as ineffective in vindicating federal statutory claims. App. 145a (Jacobs, J.). That unwarranted expansion is flatly contrary to Congress's core policy in the FAA that bilateral arbitration *is* effective to vindicate federal statutory rights.

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[18] *See also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.) (invalidating arbitration agreement under *Mitsubishi* because it eliminated a *substantive* federal remedy – namely, punitive damages).

III. THE SECOND CIRCUIT'S POLICY ARGUMENTS PROVIDE NO BASIS TO OVERRIDE THE FAA AND THIS COURT'S PRECEDENTS

The Second Circuit panel rooted its decision in a policy view that class proceedings were necessary to allow respondents to vindicate their asserted rights under the federal antitrust laws in the particular circumstances of this case. As a threshold matter, any such concerns are properly directed to Congress, which has the sole prerogative to make exceptions to the FAA. *See supra* pp. 22-24. Congress knows how to limit arbitration when it wants to do so. *See, e.g.*, 15 U.S.C. § 1639c(e) (TILA); 12 U.S.C. § 5518 (directing the Bureau of Consumer Financial Protection to conduct a study concerning pre-dispute arbitration agreements between "consumers" and providers of "consumer financial products or services" and to "prohibit or impose conditions or limitations on the use" of such agreements if such regulations are "in the public interest and for the protection of consumers").

In any event, the panel's policy justifications lack merit, because they ignore both the proven benefits of bilateral arbitration and the serious drawbacks that class actions pose for the vindication of federal statutory objectives.

A. The Second Circuit concluded "that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." App. 27a. It came to that conclusion because it credited the opinion of a consultant hired by plaintiffs that the cost of an antitrust economist's expert report – whether in "arbitration or litigation" – would be up to $1 million, which exceeded the value of each plaintiff's alleged damages. App. 18a, 26a; *see also* App.

92a n.20 (assuming that "expert fees" "would need to be expended in either action").

That reasoning strikes at the heart of the FAA because it assumes – without empirical support and contrary to Congress's considered policy judgment – that arbitration lacks the flexibility to serve as a cost-effective means for resolving respondents' antitrust disputes. Whether each claimant would have to submit a complex and costly economics expert report is a decision for the arbitrator. But it certainly was error for the panel to *assume* that arbitrators would insist on the same complexity that federal courts would require under the Federal Rules. By doing so, the panel effectively overrode Congress's judgment, repeatedly reflected in this Court's precedents, that the "adaptability" of bilateral arbitration *reduces* the costs of dispute resolution and thus facilitates the effective vindication of federal statutory claims, including Sherman Act claims. *Mitsubishi*, 473 U.S. at 633.

Indeed, as this Court has recognized, the benefits of arbitration are especially pronounced for small-value claims, including those brought by consumers. *See Allied-Bruce Terminix*, 513 U.S. at 280 ("[A]rbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."). Avoiding the high costs of litigation is "of particular importance" in disputes that "involve[] smaller sums of money than disputes concerning commercial contracts." *Circuit City*, 532 U.S. at 123. Moreover, arbitration's informality creates the possibility of non-class procedural mechanisms, consistent with the parties' agreement, for reducing these costs even further through informal cost-sharing arrangements

among plaintiffs. For example, claimants could hire the same attorneys, or hire the same expert witness, even outside the context of class proceedings.

The lower costs of arbitration also reduce businesses' costs, thus permitting lower prices for consumers and higher wages for employees. *See* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration*, 2001 J. Disp. Resol. 89, 91 ("Assuming that consumer arbitration agreements lower the dispute-resolution costs of businesses that use them, competition will (over time) force these businesses to pass their cost-savings to consumers."); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 741 (noting the cost savings that are "passed on to consumers through reductions in the price of goods and services, [or] to employees through higher wages"). Thus, bilateral arbitration offers not only increased cost efficiency once disputes arise, but also economic benefits at the time of contracting.[19]

The Second Circuit's assumption that bilateral arbitration would be ineffectual in reducing costs is contrary to the available evidence. Leading arbitration providers, including the American Arbitration Association ("AAA") and JAMS, apply expedited procedures in administering disputes under a certain dollar threshold and adhere to additional, consumer-protective rules in administering consumer disputes. These policies limit the portion of arbitrator fees the

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[19] The panel disclaimed any finding of unconscionability, App. 96a, and respondents have no viable claim that the agreement here was oppressive, given that they are merchants, many with substantial revenues, that could have chosen not to accept American Express cards. *See Concepcion*, 131 S. Ct. at 1750 n.6.

consumer is required to pay for arbitration.[20] Moreover, these rules have proven effective in obtaining compliance from businesses and lowering consumer outlays in arbitration.[21] Empirical evidence thus bears out Congress's policy judgment that bilateral arbitration is fully consistent with the effective vindication of federal statutory rights. *See* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 105-06 (2003) (finding that "employees who arbitrate their complaints fare at least as well as those who take their disputes to court," and "many more employees are able to obtain justice through arbitration than through litigation"). The Second Circuit's contrary judgment impermissibly revives the old "judicial hostility to arbitration agreements" that the FAA was designed to eradicate. *Gilmer*, 500 U.S. at 24.

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[20] *See* JAMS, *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness* (eff. July 15, 2009) (capping consumer's responsibility for arbitrator fees at $250); AAA, *Consumer Due Process Protocol*, Principle 6 (Feb. 14, 2012) ("reasonable cost" principle, in "some cases, . . . may require the [business] to subsidize the [alternative dispute resolution] process"); AAA, *Consumer-Related Disputes Supplementary Procedures* 8 (eff. Jan. 1, 2010) (consumers bringing a claim for less than $10,000 are not required to pay more than $125 in arbitrator fees).

[21] *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289, 292 (2012) (empirical study of AAA's Consumer Due Process Protocol finding that Protocol is effective); Searle Civil Justice Inst., *Consumer Arbitration Before the American Arbitration Association: Preliminary Report* 109 (Mar. 2009) (based on review of 301 consumer arbitrations closed by award in 2007, concluding that the upfront cost of arbitration for consumer claimants is low – $96 on average for sub-$10,000 claims – and consumers win some relief more than half the time).

B. While improperly discounting the demonstrated benefits of bilateral arbitration, contrary to Congress's intent, the Second Circuit also took a one-sided view of the consequences of class proceedings for the effective vindication of federal statutory policies. The Second Circuit panel focused exclusively on one feature of the aggregation brought about by class actions: its capacity to facilitate the pursuit of small claims by spreading the costs of litigation across the class. App. 18a-19a.

But aggregation also creates incentives that tend to increase litigation over questionable or frivolous claims, increasing costs and deterring socially beneficial conduct. Aggregation risks "giv[ing] a class attorney unbounded leverage," which can "essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits." S. Rep. No. 109-14, at 20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3 ("CAFA Report"). This Court, and numerous lower courts, have accordingly recognized the serious risk of "in terrorem" settlements created by class-action proceedings. *See supra* pp. 30-31; *see also, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (noting that aggregation can create irresistible settlement pressures despite "the demonstrated great likelihood that the plaintiffs' claims . . . lack legal merit").

Settlements that are out of line with the merits of the plaintiffs' underlying claim undermine, rather than promote, the "effective vindication" of federal substantive policies. Particularly in an area like antitrust law, where it may be hard to distinguish conduct that harms competition and consumers from conduct that is aggressively competitive and thus

beneficial to consumers, the threat of settlements creates significant societal costs by deterring socially beneficial conduct. *See* Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 Sup. Ct. Econ. Rev. 39, 46-47 (2008) ("Faced with the risk of being held liable whether or not he complies with the law, a potential defendant may choose to avoid the activity that might give rise to liability. . . . To the extent such litigation-induced decisions deprive society of the benefits of productive activity, low merit litigation is costly to society."). And, of course, the cost of litigation of a meritless claim – whether a settlement is paid or not – represents a cost that must be recovered in higher prices charged to consumers.

These problems are exacerbated by the fact that class actions are frequently driven by lawyers specializing in class actions whose incentives – despite procedural safeguards – may not align perfectly with those of class members, still less with those of the legal system and society more generally. As Congress found in enacting the Class Action Fairness Act of 2005 ("CAFA"), the incentives for class-action lawyers in small-value cases "create inequitable outcomes . . . and – over the long run – increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers." CAFA Report 33 (internal quotations omitted).

Given these incentives, it is realistic to acknowledge that private lawyers may bring claims that public enforcement officials would not pursue because of their limited merit. As Judge Posner has commented in the antitrust context: "Students of the antitrust laws have been appalled by the wild and woolly anti-

trust suits that the private bar has brought – and won. It is felt that many of these would not have been brought by a public agency and that, in short, the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one." Richard A. Posner, *Antitrust Law* 275 (2d ed. 2001). "[W]hile the small claimant class action may add something in the way of enforcement of efficient substantive laws, any resulting marginal deterrence comes at a great cost in terms of the incentives created for litigation of questionable claims, overenforcement of inefficient substantive laws, and higher prices to consumers." Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147, 154-55 (1995); Posner, *Antitrust Law* 275 ("The class action is the law's standard answer to the problem of aggregating a multitude of small claims, but it has serious drawbacks.").[22]

Because of these drawbacks, Congress would have no reason to interfere with private parties' decision to prioritize other mechanisms to ensure the effective enforcement of federal statutory rights. Virtually all federal statutes conferring a private right of action also provide for public enforcement by democratically accountable government officials.[23] Federal as well

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[22] As Congress found in enacting CAFA, class actions aggregating small-value claims create serious unfairness to plaintiffs, whose interests are subordinated to those of their lawyers. *See* CAFA Report 33.

[23] *See, e.g.*, Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679h (authorizing Federal Trade Commission ("FTC") and state attorneys general to enforce CROA); Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s (authorizing state attorneys general, FTC, and other federal agencies to enforce FCRA); Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C.

as state enforcement of the antitrust laws is particularly robust, consistent with Congress's intent in enacting the Sherman Act.[24] And, as discussed above, bilateral arbitration promotes cost-effective vindication of individual claims without the costs and disadvantages of class proceedings. Any business – or consumer – might agree *ex ante* to opt for a less costly dispute-resolution regime, especially because arbitration will predictably provide an efficient forum for the vindication of substantial claims.

Given that class actions entail real drawbacks for the effective vindication of federal policies, the decision whether to override private agreements to forgo participation in class litigation for any particular federal statutory claim is Congress's, not the courts', to make. The FAA evinces Congress's policy to enforce arbitration agreements, including those that call for exclusively bilateral arbitration, unless Con-

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§ 1692*l* (authorizing FTC and other federal agencies to enforce FDCPA); Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (authorizing state attorneys general and U.S. Attorney General to sue); TILA, 15 U.S.C. §§ 1607, 1611, 1640(e) (authorizing state attorneys general, FTC, and other federal agencies to enforce TILA).

[24] *See, e.g.*, Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282, 282-83 (adding § 4A to the Clayton Act, *see* 15 U.S.C. § 15a, to permit federal government to sue for damages); Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 5, 104 Stat. 2879, 2880 (amending § 4A to permit the government to recover treble damages); Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (codified as amended at 15 U.S.C. §§ 1-3) (increasing criminal penalties for Sherman Act violations); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394-96 (adding §§ 4C-4H to the Clayton Act, *see* 15 U.S.C. §§ 15c-15h) (giving states the right to bring antitrust suits for treble damages on behalf of state residents).

gress specifies otherwise. By improperly substituting its own one-sided policy judgments for those of Congress, the panel below exceeded its proper role under the FAA.

CONCLUSION

The judgment of the court of appeals should be reversed.

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STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, provides:

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

5. Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear

and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-133

In the
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

This Court has repeatedly recognized that federal statutory claims may be appropriately resolved through arbitration only "so long as the prospective litigant effectively may vindicate [its] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000). The question presented is whether an arbitration clause should be enforced when there is no dispute that a litigant has shown that it would be unable effectively to vindicate its federal statutory rights in the arbitral forum.

RULE 29.6 STATEMENT

Respondents are Italian Colors Restaurant, 429 Supermarkets Corp., Bunda Starr Corp. d/b/a Buy-Rite, Chez Noelle Restaurant Corp., Cohen Rese Gallery, Inc., DRF Jewelers Corp., Il Forno, Inc., Mai Jasmine Corp., Mascari Enterprises d/b/a Sound Stations, Mims Enterprises, Inc. d/b/a Mims Restaurant, National Supermarkets Association, Inc., ana Phuong Corp. None of the Respondents has a parent company. No publicly held company owns 10% or more of any one Respondent's stock.

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INTRODUCTION

For more than a quarter century, this Court has recognized that federal statutory claims may be appropriately resolved through arbitration under the Federal Arbitration Act ("FAA") only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This requirement reflects the uniquely federal need to harmonize the FAA's general pro-arbitration policy with competing federal statutes that enjoy equal constitutional footing. It ensures the FAA serves its purpose of actually resolving claims in a streamlined forum, without exterminating those claims in circumstances where the particulars of a specific arbitration agreement foreclose the possibility of effectively resolving the dispute in arbitration. The effective-vindication rule is thus fully consonant with the policies underlying the FAA, which is pro-arbitration in the sense that it actually wants federal statutory claims settled through arbitration, not precluded altogether.

Accordingly, this Court has squarely held that the effective-vindication rule applies where, as here, enforcing an arbitration clause would impose "prohibitive costs" that prevent a claimant from effectively vindicating her federal statutory rights. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000). The required showing is daunting. A party invoking the rule "bears the burden" of demonstrating that the costs would truly be "prohibitive," *i.e.*, would actually prohibit vindication

of federal rights, not just make doing so more difficult. *Id.* But the possibility of carrying the burden through a fact-bound showing has never been doubted and indeed has always been thought vital to harmonizing the pro-arbitration policy of the FAA with the policies underlying the federal statute at issue in a given case.

This is the rare case in which the plaintiffs have carried that burden. Respondents have proven through uncontested expert evidence that they cannot effectively vindicate their federal statutory rights through bilateral arbitration under Petitioners' arbitration clause. The necessary, non-recoupable costs of proving the elements of Respondents' antitrust claims through expert economic analysis far exceed the value of any individual recovery. Petitioners' arbitration clause neither allows a prevailing party to shift those costs nor permits any other cost-sharing mechanism that would render bilateral arbitration a feasible means of vindicating Respondents' antitrust rights. And Petitioners have never offered to shift those costs, stipulate to market power or other similar issues, or make any other accommodation that would make bilateral arbitration feasible. This is thus truly a case in which the alternative to litigation is not arbitration, but nothing. "Compelling arbitration" here would not actually lead to arbitration of Respondents' important federal antitrust claims, but rather would grant Petitioners *de facto* immunity from federal antitrust law.

The application of the effective-vindication rule under these narrow circumstances is fully consistent

with this Court's decisions. Because the decision below does not order class arbitration when the parties have not agreed to it, this case does not conflict with this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Nor does *Concepcion* implicitly undermine the effective-vindication rule. Nothing in *Concepcion* purported to overrule or limit *Randolph*. Indeed, *Concepcion* neither cites nor discusses *Randolph*, which is hardly surprising because the federal-law rule of *Randolph* was irrelevant to the preemption question in *Concepcion*. When state law conflicts with the FAA as in *Concepcion*, the Supremacy Clause itself provides the rule of decision for resolving the conflict. But when the FAA is in tension with another federal statute, like the antitrust laws, the Supremacy Clause (and therefore *Concepcion*) is irrelevant and *Randolph* provides the basis for harmonizing the two federal statutes.

Petitioners and their *amici* cannot refute any of this. Instead, they mistake this Court's narrow but vital effective-vindication doctrine for *dicta*, misconstrue Respondents' arguments, and falsely warn of future doom. But the effective-vindication rule is not *dicta*. This Court, in *Randolph*, both clarified the applicable test and squarely applied it, but concluded that the claimant failed to meet her heavy evidentiary burden. Nor has this Court ever limited the effective-vindication rule to choice-of-law provisions or some subset of costs imposed by an arbitration clause—limitations that would be neither logical nor administrable. Petitioners also mistakenly complain that Respondents demand class

arbitration, or even class litigation. All that Respondents desire is the ability to effectively vindicate their federal antitrust rights in some forum. If Petitioners want to adopt a better arbitration agreement that allows cost-shifting for prevailing parties, such as the one employed by AT&T in *Concepcion* or by a number of other large companies, Respondents stand ready to vindicate their federal antitrust claims through bilateral arbitration. Indeed, such agreements, which guarantee *both* the efficiencies of the arbitral process and the effective vindication of rights, are becoming more common. But nothing in the FAA—which favors arbitration, not *de facto* immunity—or common sense permits Petitioners to demand enforcement of an arbitration clause with respect to claims that simply cannot be addressed under the terms of that clause. Petitioners nominally sought to compel arbitration, but in light of the uncontested showing of prohibitive costs, what they really seek to compel is the non-arbitration and non-vindication of important federal claims. Permitting such immunity is antithetical to the policies of both the FAA and the federal antitrust laws. The effective-vindication doctrine wisely prevents that perverse result.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act, the Sherman Act, and Article VI of the United States Constitution are reproduced in the Statutory Appendix.

STATEMENT OF THE CASE

A. Respondents' Federal Antitrust Claims

Respondents are merchants who sued American Express (Amex) for violations of the federal antitrust laws. The crux of their complaint is that Amex compels merchants to accept Amex-branded mass-market credit cards, including bank-issued cards, as a condition of accepting Amex corporate and premium charge cards. Respondents assert that Amex has monopoly power in the markets for corporate and premium cards, and that it uses that power to force merchants to accept ordinary credit cards at rates approximately 30% higher than the fees for identical bank-issued cards in competing networks (*e.g.*, Visa and MasterCard). This monopoly power also contributed to Respondents' acceptance of the arbitration clause in dispute. *See* JA 77–78 (Amended Complaint) ("In order to maintain its ability to exercise monopoly power, American Express imposes upon merchants in its standard form merchant services agreements a provision designed to insulate itself from any class-wide liability for antitrust violations.").

Amex's tying arrangement, which Respondents attack as unlawful under the Sherman Act, has had specific and provable anticompetitive effects in the market for ordinary credit-card acceptance.[1]

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[1] "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461–62 (1992) (citation and internal quotation marks omitted). A tying arrangement violates § 1 of the Sherman Act, under Second Circuit

Specifically, the tying arrangement has allowed Amex to offer banks vastly higher "interchange" fees than Visa and MasterCard.[2] That, in turn, has driven those companies to raise their own interchange fees to avoid losing bank issuers to Amex. The result has been an upward spiral in interchange fees without the downward price competition that normally exists in competitive markets. This breakdown of normal competitive forces in the credit-card-acceptance market has prompted, in addition to this case, merchant class actions against Visa and MasterCard that have produced settlements providing for reformative network rules changes and billions of dollars in compensation to merchant businesses and their customers.[3] In addition, the Department of Justice

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precedent, only if the seller has appreciable economic power in a properly defined tying product market and if plaintiffs demonstrate a substantial likelihood of harm to competition in a defined tied-product market. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa Check/MasterMoney Antitrust Litig.)*, 280 F.3d 124, 133 n.5 (2d Cir. 2001); *see also Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997). Respondents here propose to satisfy their burden by proving actual harm to competition.

[2] "Interchange fees" are fees that the "card-issuing bank" receives "each time it provides funds ... as payment to a merchant for the cardholder's purchase." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. (In re Visa Check)*, 396 F.3d 96, 102 (2d Cir. 2005).

[3] *See, e.g., In re Visa Check*, 396 F.3d at 101 (approving settlement of tying claims similar to those challenged here for $3.1 billion and rules reforms); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (approving settlement of claims regarding fixing of foreign exchange fees

brought enforcement actions against Visa, MasterCard, and Amex seeking relief that complements the injunctive relief sought in the merchant class cases against all three networks.[4]

Prosecuting Respondents' tying case is no small task. In the courts below, Respondents presented expert analysis demonstrating the high costs of proving their claims. Based on this evidence, it was uncontested below that Respondents cannot prosecute their claim without at least one detailed antitrust market study. Pet. App. 25a–27a. It was also uncontested that the study in this case will be "necessarily complex and costly" because it will require specific determinations concerning:

- the relevant "tying" and "tied" product markets and whether they are distinct from one another;
- whether Amex has monopoly market power in the "tying" product market;

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for $336 million and reform of rules). More recently, in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-md-1720 (E.D.N.Y), Doc. No. 1588, merchants challenged, among other things, "anti-steering rules" that are identical to rules imposed by Amex, *see infra* note 4.

[4] *See United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y.). The United States entered into consent decrees with Visa and MasterCard, *id.* Doc. No. 4, and continues to litigate against American Express. The United States is seeking certain targeted injunctive relief, whereas private plaintiffs in coordinated proceedings are seeking broader, market-wide injunctive relief as well as monetary damages. *See In re Am. Express Anti-Steering Rules Antitrust Litigation*, No. 11:MD-2221 (E.D.N.Y.).

- whether Amex has exercised its monopoly market power to enforce the tying arrangement;
- whether the tying arrangement has had discernible anticompetitive effects in the "tied" product market;
- what the merchant fees would have been but for the anticompetitive tying arrangement; and
- the dollar amount of the damages to the individual claimant as a consequence of the tying arrangement.

Pet. App. 87a–88a.

Given these complex, contested, and time-consuming inquiries, Respondents' uncontested evidence shows that the cost of conducting the market study—which is not recoverable even if Respondents prevail—is "at least several hundred thousand dollars" and could "easily exceed $1 million." Pet. App. 87a. This total dwarfs, many times over, the recovery that any named plaintiff could hope to obtain—approximately $5,252 for the "median volume" merchant plaintiff and $38,549 for the largest-volume merchant plaintiff. Pet. App. 89a.

B. District Court Proceedings

Based on this evidentiary showing, which Petitioners did not dispute, Respondents opposed the motion to compel arbitration on the ground that they would, in fact, be unable to arbitrate their federal statutory rights under the specific arbitration agreement here.

The arbitration agreement in this case is eight years old and bears none of the attractive features of the agreement at issue in *Concepcion* or the pro-vindication agreements employed by many other companies. It provides no mechanism for either sharing or reimbursing the costs of the requisite market study. It precludes the spreading of costs among claimants even in separate bilateral arbitrations by prohibiting the sharing of "any information relating to ... the arbitration proceedings." Pet. App. 92a. In addition, the arbitration agreement prevents claimants from seeking relief "on behalf of ... other [merchants]," Pet. App. 67a—meaning that it precludes the possibility of obtaining the kind of market-wide injunctive relief that is often necessary to remedy systemic anticompetitive conduct.

Respondents argued that directing them to the arbitral forum would not result in the actual arbitration of their Sherman Act claims because, under the particular circumstances of this case, such an order would "impose such punishing costs" on each claimant "as to preclude vindication" of their rights under the federal antitrust laws. Pet. App. 108a. The district court nonetheless granted Petitioners' motion to compel arbitration. Pet. App. 123a.

C. Court of Appeals Decisions

The Second Circuit reversed. It determined that the effective-vindication question was "plainly" a question for the court, not the arbitrator, to decide, Pet. App. 75a (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)), and then

analyzed that question under the effective-vindication framework set forth by this Court in *Randolph*.

Applying that framework to the specific facts of the case, the Second Circuit held that Respondents met their heavy burden. The court found that the "uncontested" record evidence before it—like the "similar" evidence in another court of appeals case where plaintiffs successfully showed that "prohibitive costs" would prevent the vindication of similarly complex federal antitrust claims, *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006)—established that Respondents "would incur prohibitive costs if compelled to arbitrate" because the non-recoverable, per-claimant costs of bringing their claims in arbitration (as opposed to class proceedings in court) would exceed their expected individual recoveries many times over. Pet. App. 86a–91a (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (reimbursement of expert witness fees capped by federal statute at $30 per witness per day)). The court therefore held that the arbitration clause could not "be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability." Pet. App. 95a.

At the same time, the Second Circuit emphasized the limited scope of its opinion. It explained that it was not holding that arbitration clauses "are *per se* unenforceable in the context of antitrust actions," but only that—consistent with this Court's approach in *Randolph*—"*each* case" presenting the question "must be considered on its own merits, governed with a healthy regard for the fact that the FAA 'is a

congressional declaration of a liberal federal policy favoring arbitration agreements.'" Pet. App. 97a (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

This Court granted *certiorari*, vacated the Second Circuit's opinion, and remanded for further consideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). *Stolt-Nielsen* characterized the differences between bilateral arbitration and class arbitration as "fundamental," and therefore held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775–76.

On remand, the Second Circuit agreed with Petitioners that *Stolt-Nielsen* would "plainly preclude[] [the court] from ordering class-wide arbitration." Pet. App. 55a. But the Second Circuit explained that it "did not do so" in its previous opinion. Pet. App. 55a. Class proceedings, if any, would take place in the district court, not in arbitration—unless the parties agreed otherwise. The Second Circuit thus concluded that *Stolt-Nielsen* did not alter the outcome of its prior decision. Pet. App. 55a.[5]

After this Court decided *Concepcion*, the Second Circuit again reconsidered its decision, this time on

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[5] Justice Sotomayor was a member of the panel when the Second Circuit first decided the case. *See* Pet. App. 57a. By the time the panel reconsidered its opinion in light of *Stolt-Nielsen*, she had been elevated to this Court. *See* Pet. App. 31a, n.1.

its own initiative. Pet. App. 125a–26a. The Second Circuit read *Concepcion* and *Stolt-Nielsen* as "stand[ing] squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"—whether by state law or by the FAA—"unless the parties agree to class action arbitration." Pet. App. 16a. The court observed that neither case mentioned *Randolph* or addressed whether an arbitration clause "is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." Pet. App. 15a, 24a. Thus, the court concluded that neither decision undermined the effective-vindication rule.

Recognizing that *Randolph*—not *Stolt-Neilsen* or *Concepcion*—provided the relevant inquiry, the Second Circuit reiterated its earlier conclusion. "The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Pet. App. 25a. The court therefore held that, based on the specific record in this case, it would decline to "strip the plaintiffs of rights accorded them by statute" by compelling an arbitration that would never occur. Pet. App. 30a.

At the same time, the Second Circuit stressed the uphill battle facing other plaintiffs who seek to invalidate arbitration clauses based on the effective-vindication principle. Pointing to several cases in which plaintiffs tried but failed to meet the exacting

standard of *Randolph*, the Second Circuit made clear that these "failures speak to the quality of the evidence presented, not the viability of the legal theory." Pet. App. 24a–25a. That "plaintiffs so often fail" in these attempts, the Second Circuit explained, "demonstrates that the [necessary] evidentiary record ... is not easily assembled, and that the courts are capable of the scrutiny such arguments require." Pet. App. 25a. And again the court stressed that it was not ordering a specific course of proceedings, only that Respondents must be afforded the ability to vindicate their federal antitrust claims. *See* Pet. App. 25a.

SUMMARY OF ARGUMENT

I. The effective-vindication rule is a narrow, but essential safety valve that ensures the FAA's broad policy in favor of arbitration does not eviscerate more specific federal statutory rights. This Court has always maintained that federal statutory claims are subject to arbitration only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637; *see also Randolph*, 531 U.S. at 91–92. And this Court has repeatedly reaffirmed that it "would have little hesitation in condemning" an arbitration agreement that prevented the effective vindication of statutory rights. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

The effective-vindication rule harmonizes the FAA with other federal statutes by giving effect to both statutory regimes to the fullest extent possible. The rule ensures that by agreeing to arbitrate their

federal claims, claimants do not sacrifice their federal rights but instead secure an alternative forum in which to vindicate those rights. In this sense, the effective-vindication rule is like this Court's other doctrines for reconciling competing federal statutory regimes—such as implied antitrust immunity—which eliminate clear repugnancy between two statutes of equal constitutional stature. But in an important way the effective-vindication rule is different. When the minimal requirements for proving a particular federal statutory claim and the mandates of a specific arbitration agreement interact so that the federal claims cannot be vindicated in an arbitral forum, compelling arbitration is contrary to the policies of *both* the FAA and the underlying federal statute. The FAA reflects a federal policy favoring actual arbitration—not a policy favoring *de facto* immunity or a policy of hostility to litigation when the alternative is not arbitration, but nothing at all.

The effective vindication rule is narrow. It applies when an arbitration agreement would impose "prohibitive costs" that would prevent a claimant from effectively vindicating her federal statutory rights in the arbitral forum. And "prohibitive costs" means just that. It is not enough that the costs make vindication of federal rights more difficult, or lower the incentives for proceeding in arbitration. Rather, the claimant bears the burden of proving that the arbitral agreement actually prohibits the effective vindication of federal rights, such that being consigned to the arbitral forum will not result in the arbitration of the federal statutory claims but will

instead serve as the functional equivalent of a grant of immunity.

II. The decision below is consistent with this Court's recent decisions concerning class arbitration. Respondents unequivocally do not request class arbitration, and the court of appeals did not order class arbitration. Thus, this case does not conflict with this Court's decisions in *Concepcion* and *Stolt-Nielsen*. Moreover, nothing in *Concepcion* implicitly undermined the effective-vindication rule. *Concepcion* does not even cite the Court's longstanding effective-vindication precedents, which is hardly surprising given that *Concepcion* was a preemption case concerning conflicts between the FAA and competing *state* law. The effective-vindication rule, in contrast, is a uniquely federal doctrine that reconciles conflicts between the FAA and competing *federal* statutory rights.

Nor does the effective-vindication rule lead to widespread invalidation of arbitration agreements, as Petitioners suggest. The rule is exceedingly narrow and thus very rarely satisfied. Over the past two decades, the courts have demonstrated the ability to distinguish between unsupported speculation and the truly rare case where record evidence proves that prohibitive costs will preclude the effective vindication of a federal claim in arbitration. Indeed, in the only other court of appeals case involving similarly complex antitrust claims and a similarly uncontested factual record, the plaintiffs were similarly found to have satisfied the rule's stringent requirements. In other cases involving mere speculation, where the costs merely

diminished the incentive to pursue arbitration, or where the costs were substantial but not "prohibitive," neither this Court nor the lower courts have hesitated to enforce arbitration agreements according to their terms.

Furthermore, companies are increasingly drafting arbitration clauses that ensure the effective vindication of federal rights in the arbitral forum. The agreement at issue in *Concepcion* is an example. Among other things, AT&T agreed to pay double attorney's fees and all costs of pursuing the claims if an arbitration award exceeded the company's last written settlement offer. Other companies have adopted similar terms providing for the shifting of necessary costs, including expert fees. These clauses would allow Respondents to vindicate their claims. Amex's very different agreement does not. Any party drafting an arbitration agreement can readily ensure that the agreement will permit the vindication of federal statutory claims and make any judicial resort to the effective-vindication doctrine unnecessary. Thus, continued application of the effective-vindication doctrine implicates no floodgates concerns but does create healthy incentives for parties to draft truly pro-arbitration agreements. Those incentives undoubtedly will promote the FAA's core purpose by spurring private arbitration agreements that can be enforced according to their terms without foreclosing the vindication of federal rights.

Petitioners' position would do the opposite, ending both the effective-vindication rule and this beneficial trend. Companies would instead have

every incentive to impose highly restrictive arbitration terms that, like Petitioners', insulate them from federal liability.

III. The effective-vindication rule clearly applies here. It is undisputed that, unlike the agreement in *Concepcion*, Petitioners' arbitration clause prohibits Respondents from shifting, or even sharing, non-recoupable costs that are necessary to establish their federal antitrust claims. Thus, each individual Respondent will be forced to bear those costs on its own. And those costs—if they can be neither recouped nor shared—are plainly prohibitive. Respondents presented expert evidence that it would cost several hundreds of thousands (if not millions) of dollars to provide the expert market analysis necessary to prove their antitrust claims. But while the claims here are substantial, with some of the larger merchants seeking to recover nearly $40,000, the recoveries are still dwarfed by the necessary expert costs. Thus, in this case, the alternative to litigation (where costs can be shared) is not arbitration, but the complete inability to vindicate federal rights in any forum.

Petitioners suggest that the effective-vindication rule is just a mechanism to permit class actions by businesses like Respondents that have agreed to arbitrate. But that is simply incorrect. Respondents do not seek to avoid arbitration *per se*, nor do they insist on proceeding as a class. All they desire is the ability to vindicate their federal antitrust claims in some forum. The cost-sharing available in class-action litigation provides one mechanism to address the high expert costs associated with Respondents'

tying claim, but it is far from the only mechanism. If Petitioners prefer non-class arbitration, they could offer to shift Respondents' costs, or they could permit Respondents to share those costs through mechanisms other than class proceedings. Or they could even stipulate to market power and the other disputed issues addressed by Respondents' expert. The choice is theirs. But what they cannot do is continue to foreclose legitimate federal antitrust claims.

ARGUMENT

I. This Court Has Long Recognized That Arbitration Agreements Should Not Be Enforced When Prohibitive Costs Prevent The Effective Vindication Of Federal Statutory Rights In The Arbitral Forum.

This Court's application of the FAA to federal statutory rights rests critically on the existence and continued vitality of the effective-vindication rule. Courts, including this one, were initially reluctant to compel the arbitration of federal statutory claims at all, and ultimately did so only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637. That narrow rule is not some hangover from the days of judicial hostility to arbitration but a guarantee that the arbitral forum will actually be available to vindicate statutory rights. It is a necessary rule to harmonize the FAA with the policies underlying other federal statutes. Indeed, the rule furthers the policy of the FAA itself, which is pro-arbitration in the sense of wanting arbitration actually to occur, not simply anti-

litigation or pro-immunity from other important federal laws. Consistent with its role in vindicating the FAA and harmonizing it with other federal statutes, the effective-vindication rule is narrow. It requires costs to be prohibitive, not just substantial or daunting. But when the costs are prohibitive and the alternative to litigation is not arbitration, but nothing, the effective-vindication rule ensures that private parties are not needlessly precluded from vindicating important federal statutes.

A. This Court's Application of the FAA to Federal Statutory Claims Rests Critically on the Effective-Vindication Rule.

This Court has recognized the effective-vindication rule for as long as it has applied the FAA to federal statutory claims. For much of the twentieth century, this Court took the view that federal statutory claims could not be arbitrated at all. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953). In a series of cases beginning in 1985 with *Mitsubishi*, however, this Court changed its view and recognized that the FAA appropriately governs federal statutory claims. *Mitsubishi* explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but "submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628; *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (same) (overruling *Wilko*). Thus, this Court rejected the *Mitsubishi* plaintiffs' suggestion that the FAA does not reach federal statutory claims generally, *see id.* at 624–25, or

federal antitrust claims in particular, *see id.* at 628–29.

The effective-vindication rule was critical to this Court's holding. The availability of the arbitral forum to vindicate "the substantive rights afforded by the statute," *id.* at 628, and to ensure that the Sherman Act "will continue to serve both its remedial and deterrent function," *id.* at 637, was central to the Court's reasoning. Indeed, the Court expressly cautioned that the FAA applies only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.* It thus harmonized the FAA's general pro-arbitration policy with the specific federal statutory rights in any given case. In doing so, the Court bolstered the congressional policy in favor of arbitration while safeguarding public confidence in the arbitral process. The FAA applies to federal statutory claims and mandates arbitration according to contractual terms except in the very rare instance when an arbitration clause will foreclose the effective vindication of a federal right.

Since *Mitsubishi*, this Court has repeatedly reaffirmed the effective-vindication rule as 'an essential safety valve to preserve federal rights and to reconcile the FAA with the balance of the federal code. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court found no "inherent inconsistency" between arbitration and the "important social policies" furthered by the Age Discrimination in Employment Act because "the statute will continue to serve both its remedial and deterrent function"—but, again, only "'so long as the prospective litigant effectively

may vindicate his or her statutory cause of action in the arbitral forum.'" 500 U.S. 20, 27–28 (1991) (brackets omitted) (quoting *Mitsubishi*, 473 U.S. at 637). In *Vimar Seguros*, the Court reiterated that it "would have little hesitation in condemning" an arbitration agreement that prevented the effective vindication of statutory rights. 515 U.S. at 540 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). And most recently, in *14 Penn Plaza LLC v. Pyett*, this Court recognized that arbitration agreements may not prevent claimants "from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" 556 U.S. 247, 273–74 (2009) (quoting *Randolph*, 531 U.S. at 90).

In *Green Tree Financial Corp.-Alabama v. Randolph*, this Court held that the effective-vindication rule is satisfied when arbitration would entail prohibitive costs that prevent effective vindication of a federal statutory right. 531 U.S. at 90–91. Specifically, the Court envisioned a claimant making a particularized showing that the costs of arbitrating under the agreement would be "prohibitive," *i.e.*, exceed the maximum potential recovery. *Randolph* reiterated that the FAA was never intended to—and properly applied, does not—eviscerate other federal statutory protections: "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." 531 U.S. at 90 (brackets and internal quotation marks omitted). The Court then addressed the plaintiff's suggestion that she might "be required to

bear prohibitive arbitration costs if she pursues her claims in an arbitral forum" and thus that "she is unable to vindicate her statutory rights in arbitration." *Id.* The Court explained that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Then the Court applied that test to the facts before it, noting that "the record does not show that Randolph will bear such costs if she goes to arbitration." *Id.* And "[t]he 'risk' that Randolph will be saddled with prohibitive costs," this Court held, "is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

The effective-vindication rule is similar to other efforts by this Court to reconcile competing statutory regimes, like the implied antitrust immunity doctrine. Both doctrines apply only to the intersection of federal statutes. *See, e.g., Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 271 (2007) ("Where regulatory statutes are silent in respect to antitrust, ... courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws."). Both doctrines are designedly difficult to satisfy. *See, e.g., Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) ("Repeal of the antitrust laws by implication is not favored and not casually to be allowed."). As with the effective-vindication rule, this Court refrains from enforcing the antitrust laws only where there is a "clear repugnancy" between those laws and another federal statute. *See, e.g., Credit Suisse*, 551 U.S. at 275 ("[W]hen a court decides whether securities law

precludes antitrust law, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint—or ... whether the two are 'clearly incompatible.'"). And the courts have had little difficulty policing the two doctrines' narrow bounds. *Compare Credit Suisse*, 551 U.S. at 271 (collecting implied antitrust immunity cases), *with infra* pp. 29–32 (collecting effective-vindication cases).

There is, however, one important difference between the effective-vindication rule and other doctrines designed to eliminate conflict between two federal statutes. In the narrow circumstances in which the effective-vindication rule is satisfied, it does not vindicate the policies of the underlying federal statute at the expense of the FAA's policies. To the contrary, it vindicates the FAA's policy as well as that of the underlying statute. The FAA reflects a decidedly pro-arbitration policy, but what it favors is the resolution of claims in arbitration, not the complete elimination of claims resulting from the terms of an arbitration agreement. *See* 9 U.S.C. § 2 (providing for enforcement of agreements "to *settle by arbitration* a controversy" (emphasis added)); *cf. Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (Wilkinson, J.) ("By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution."). In other words, when the

choice is arbitration or litigation, the FAA prefers arbitration. But if the choice is between litigation and nothing, the FAA does not prefer "nothing," and there is every reason to vindicate the underlying federal statute. Moreover, because continued application of the effective-vindication doctrine encourages parties to form truly pro-arbitration agreements that facilitate the effective vindication of federal statutory rights, *see infra* § II.C, the rule affirmatively promotes the FAA's pro-arbitration policy, and engenders confidence in the arbitral forum.

Petitioners cannot dismiss this Court's holding in *Randolph* as *dicta*. The Court in *Randolph* confronted the plaintiff's argument under the effective-vindication rule—while repeating, rather than questioning, the rule's importance—and squarely applied the rule to the facts of the case. *See* 531 U.S. at 90–92. It rightly placed "the burden of showing the likelihood of incurring [prohibitive] costs" on the plaintiff and correctly held that she "did not meet that burden." *Id.* at 92. The Court's opinion did not delineate "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence," because in *Randolph* there was no "timely showing at all on the point." *Id.* But this Court, having held that the plaintiff's showing was inadequate, left no doubt that the effective-vindication doctrine is settled law and that such a significant, fact-bound showing is possible.

Nor is the effective-vindication rule limited to "arbitration-specific" costs or choice-of-law

provisions, as Petitioners also suggest (at 41–48). This Court's reasoning in *Randolph* was in no way limited to "filing fees, arbitrator's fees, and other administrative fees imposed by the arbitral forum." Br. for Pet'rs at 41. Rather, the Court categorically held that the effective-vindication rule applies when "arbitration would be prohibitively expensive." *Randolph*, 531 U.S. at 92. To be sure, the plaintiff's argument in *Randolph* concerned filing fees, arbitrator's fees, and other administrative costs. *See id.* at 90–91 n.6. But the specific characteristics of the fees had no bearing on the Court's articulation of the effective-vindication rule in *Randolph* or any other case. Indeed, this Court's statement in *Mitsubishi* and later cases that federal statutory rights are subject to arbitration only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," 473 U.S. at 637, does not turn on the precise way in which the arbitration agreement or the costs of arbitrating prevent the vindication of substantive rights. What matters is whether, not precisely why, the federal statutory claims can be resolved in the arbitral forum.

Randolph itself proves this. While prior cases expressed concerns about the substantive preclusion of federal statutory claims, *Randolph* demonstrates that the Court is equally concerned about the possibility that procedural costs would foreclose consideration of federal claims. And having declined to distinguish between substantive and procedural bases for foreclosing federal statutory claims, it would make no sense to slice the doctrine even thinner by having it turn on whether the "prohibitive

costs" are imposed by filing fees or by some other provision of the arbitration agreement (such as the prohibition on cost-sharing in the Amex agreement).

Indeed, Petitioners' arguments are doctrinally illogical. Once it is accepted that the effective-vindication doctrine applies when federal statutory rights cannot be vindicated in the arbitral forum, the precise manner in which the arbitration clause prevents effective vindication can hardly be determinative. A flat ban on litigating antitrust claims, a choice-of-law provision with the same effect, a filing fee with the same effect, or rules against cost-shifting or cost-sharing with the same effect, all preclude the effective vindication of antitrust claims in the arbitral forum. In each case, the consequences of enforcing the arbitration agreement will not be to compel actual arbitration of the claims but to foreclose any determination and to frustrate the "remedial and deterrent function" of the Sherman Act. *Mitsubishi*, 473 U.S. at 637. In each case, the choice will not be between arbitration and litigation, but between litigation and nothing. There is simply no basis in doctrine or common sense to distinguish among the various ways in which an arbitration agreement can preclude the effective vindication of federal statutory rights.

Petitioners are similarly off base to suggest (at 22–24) that the effective-vindication rule cannot apply here because Congress did not contemplate class arbitration when it enacted the FAA and the Sherman Act. First and most critically, Respondents do not insist on class arbitration, and the decision below expressly did not order class arbitration, *see*

infra § II.A. Petitioners' continued suggestion otherwise is mystifying. Moreover, it is irrelevant whether, in 1890, decades before Rule 23 of the Federal Rules of Civil Procedure was promulgated, "Congress rejected a proposal to adopt a class-action mechanism to address the problem of small-damages antitrust claims." Br. for Pet'rs at 24. Under current law, Rule 23 permits class actions for federal claims, and Petitioners surely do not mean to suggest that the Sherman Act's legislative history *prohibits* antitrust class actions under Rule 23. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979). The reality is that Congress was happy for Sherman Act claims to be litigated against the backdrop of existing procedural rules, which have always included cost-sharing mechanisms like joinder, and it was equally happy to have those claims litigated exclusively in federal court—and not in arbitration—for decades after the passage of the FAA and before *Mitsubishi*. Congress was equally happy to have antitrust claims actually resolved in arbitration with the express assurance from this Court that the effective-vindication rule would ensure that Sherman Act claims would not go wholly unresolved. But there is no indication—and certainly none in the 1890 legislative history—that Congress would be indifferent to having serious antitrust violations go completely unremedied because an arbitration agreement foreclosed the possibility of either litigating or arbitrating the claims.

For the past quarter century, this Court has always maintained the effective-vindication rule as a narrow means for harmonizing the FAA's liberal policy in favor of arbitration with other federal

statutory protections. The rule does not disrupt "the central or 'primary' purpose of the FAA ... to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 130 S. Ct. at 1773. It merely recognizes that "no legislation pursues its purpose at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam), and that the FAA's general policy in favor of arbitration was not intended to eliminate more specific federal rights found in statutes of equal constitutional footing. Thus, parties remain "generally free to structure their arbitration agreements as they see fit," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (internal quotation marks omitted), while the effective-vindication rule ensures that federal judicial enforcement of arbitration agreements will not result in the unwitting foreclosure of federal statutory rights.

B. The Effective-Vindication Rule Requires a Demanding Evidentiary Showing.

The effective-vindication rule is rightly very narrow. "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Randolph*, 531 U.S. at 92 (citing *Gilmer*, 500 U.S. at 26; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)). Costs must truly be prohibitive; substantial or daunting costs are not enough. The "risk" of prohibitive costs does not suffice. *Randolph*, 531 U.S. at 90. Nor does mere "speculation" that a party

will not be able to vindicate her rights through arbitration. *14 Penn Plaza*, 556 U.S. at 273–74. Instead, to satisfy the rule, there must be proof that vindication of the federal right in the arbitral forum is simply not feasible.

The courts are capable of holding claimants to this burden. This Court has set the evidentiary bar very high. The costs must truly be prohibitive. It is not enough if the costs merely lower incentives. And when a claimant argues that prohibitive costs prevent the effective vindication of rights, "the record [must] show that [the claimant] will bear such costs if she goes to arbitration." *Randolph*, 531 U.S. at 90. In every case to come to this Court before this one, such hard record evidence has been lacking and the Court enforced the challenged arbitration clause. But it is every bit as important to apply the effective-vindication rule in the rare case where such a showing is made as it is to enforce the agreement when the showing is absent.

Likewise, lower courts have long recognized the effective-vindication rule as a vital component of this Court's FAA jurisprudence and yet have applied it strictly, with a healthy regard for the strong federal policy in favor of arbitration, when arbitration will actually occur. Every regional circuit has recognized and applied the effective-vindication rule.[6] But the

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[6] *See, e.g.*, *Kristian*, 446 F.3d at 54–59 (1st Cir. 2006); Pet. App. 22a-25a; *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 216–17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556–57 (4th Cir. 2001); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658–60 (6th Cir. 2003)

test has been found satisfied only rarely. And it is no coincidence that one of those rare cases involved the same kind of complex antitrust claims and uncontested evidence as involved here. In *Kristian v. Comcast Corp.*, the plaintiffs submitted the same type of uncontested expert testimony as Respondents have to establish the impossibility of pursuing their antitrust claims in arbitration. *See* 446 F.3d at 58. Specifically, the plaintiffs submitted uncontested expert affidavits showing that "to prosecute their antitrust claims successfully, Plaintiffs will have to undertake an elaborate factual inquiry"; "expert witness fees alone will cost a minimum of $300,000, which could exceed in excess of $600,000"; and "an individual recovery ... will range from a few hundred dollars to a few thousand dollars at most." *Id.* The First Circuit, like the Second Circuit here, held that on these undisputed facts "Plaintiffs will be unable to vindicate their statutory rights." *Id.* at 61.

In other cases, the lower courts have readily rejected effective-vindication arguments lacking adequate factual support. *See, e.g.*, *Coneff*, 673 F.3d at 1158 n.2 ("Plaintiff's federal claim fails under *Green Tree*"); *Atl. Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 285 (4th

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(en banc); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 566–67 (8th Cir. 2007); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 & n.2 (9th Cir. 2012); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 780 (10th Cir. 2010); *Musnik v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259–60 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001). The Federal Circuit has not considered the issue.

Cir. 2007) (Plaintiffs "developed no evidentiary record ... establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration."); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 82 (D.C. Cir. 2005) (Roberts, J.) ("Under the approach set forth in ... *Green Tree*, and *Vimar*, such speculation about what *might* happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable."). These cases—not those satisfying the effective-vindication rule—are the norm. In fact, the vast majority of disputes subject to an arbitration agreement proceed to arbitration with no suggestion of the effective-vindication rule and thus produce no decision on the matter.

Within the Second Circuit, moreover, the decision below has hardly opened the floodgates that Petitioners ominously predict. There have been only a small handful of prohibitive-costs cases in the four years since *Amex I*. In one of those cases, *Sutherland v. Ernst & Young LLP*, the district court set forth a narrow conception of the effective-vindication rule and found the rule satisfied based on a clear record that the arbitration clause "would operate as a waiver of Sutherland's right to pursue her statutory remedies pursuant to FLSA." 847 F. Supp. 2d 528, 538 (S.D.N.Y. 2012). In another, by contrast, the district court rejected a prohibitive-costs argument because the plaintiffs "failed to meet their burden of demonstrating that they would be unable to vindicate their statutory rights in the arbitral forum." *Cohen v. UBS Financial Services, Inc.*, 2012 WL 6041634 at *5 (S.D.N.Y. Dec. 4, 2012). Thus, following the

decision below, the lower courts have continued to enforce the high evidentiary bar for proving an effective-vindication argument, with a healthy regard for the FAA's policy in favor of arbitration.

Petitioners' related assertion (at 44 n.16) that continued application of the effective-vindication rule will add "another complex, fact-intensive inquiry to the threshold arbitrability test" is wrong for similar reasons. As demonstrated above, the universe of cases that even implicate the effective-vindication rule is very small. And even in that narrow band of cases, the prohibitive-costs analysis is a straightforward question of whether the non-recoupable costs that must be incurred in arbitration, but could be avoided or spread in litigation, exceed the plaintiff's potential recovery. That is the inquiry this Court sanctioned in *Randolph*, and it ultimately requires a comparison of only two variables. The inquiry has not led to time-consuming "mini-trials" in the decades in which lower courts have viewed the effective-vindication doctrine as an important, if rarely invoked, safety valve to ensure that a policy favoring the settling of claims in arbitration does not inadvertently render some federal claims incapable of vindication in any forum. And, of course, parties who want to avoid any such additional inquiry can adopt arbitration terms that ensure the effective vindication of rights. *See infra* § II.C.

Finally, plaintiffs will invoke the effective-vindication rule only when litigation (or some other alternative) is likely to enable the vindication of their rights. There are some statutory claims that will not be pursued in any forum. But when costs uniquely

associated with a particular arbitration agreement—whether filing fees or other costs that the agreement precludes from being shared or spread—exceed the maximum recovery, the inquiry is not difficult, and there is no reason not to allow the plaintiffs to make the required showing and pursue their claims in the only forum in which they can possibly vindicate their rights.

The heavy and rarely satisfied evidentiary burden for effective-vindication claims is consistent with the rule's place in this Court's broader FAA jurisprudence. Because the effective-vindication rule exists to reconcile the FAA with other federal rights—and to give each the fullest effect possible—the rule is satisfied only when, and to the extent that, enforcement of an arbitration clause will *actually* prevent the effective vindication of a federal statutory right. In those narrow circumstances, an order to compel arbitration will not actually result in arbitration, but instead will compel only the abandonment of a federal statutory right, which is a result favored by neither the FAA, nor the Sherman Act, nor any other underlying federal statute. Twenty years of lower court decisions demonstrate that the doctrine is both vital and rarely satisfied. Petitioners' floodgates argument is thus doubly problematic. The effective-vindication doctrine has been the law of the land for over twenty years, and still the conjured flood is just a trickle. Yet eliminating the doctrine entirely would create results wholly incompatible with both the FAA and an array of other federal statutes.

II. The Effective-Vindication Rule Is Consistent With This Court's Arbitration Decisions.

The effective-vindication rule does not require class arbitration or otherwise conflict with this Court's recent decisions in *Concepcion* and *Stolt-Neilsen*. Despite Petitioners' persistent suggestions otherwise, Respondents do not seek class arbitration, and the decision below expressly did not order class arbitration. All that is at issue here is whether Respondents can vindicate their federal statutory rights in some forum. Their ability to do so does not necessarily turn on the availability of class proceedings, in arbitration or otherwise. Although the cost-sharing permitted in class-action litigation in federal court would permit Respondents to vindicate their Sherman Act damages claims, so too would effective cost-shifting or cost-sharing provisions in the arbitration agreement. Nor does anything in *Concepcion* undermine the effective-vindication rule. *Concepcion* does not mention the rule or any of the cases that invoke it. That is because *Concepcion* is a preemption case concerning conflicts between the FAA and state contract laws. The effective-vindication rule, by contrast, is uniquely federal. Simply put, the effective-vindication doctrine remains just as vital and just as narrow after *Stolt-Neilsen* and *Concepcion* as it was before those decisions.

A. Respondents Do Not Seek Class Arbitration, and the Decision Below Did Not Order Class Arbitration.

Plain and simple, Respondents do not seek class arbitration, and the decision below does not order class arbitration. *See* Pet. App. 129 ("At issue here is not the right to proceed as a class, but the ability to vindicate a federal statutory right ...."). Petitioners' attempt to suggest otherwise (*e.g.*, at 23, 27–31) is a red herring. Respondents do not seek to compel class arbitration, but only to vindicate their federal antitrust rights. Indeed, what Respondents specifically requested in the courts below was not an order compelling class arbitration, but an order denying the enforcement of arbitration altogether. That is because, under the circumstances of this case, an order nominally compelling arbitration would in fact compel Respondents to abandon their claims altogether, as they cannot be vindicated in the arbitral forum consistent with the binding terms of the arbitration agreement. Those claims can be vindicated in federal court because the class-action device allows the costs of an economic expert report to be shared. But even such collective litigation is neither what Respondents seek in itself nor what the effective-vindication doctrine entitles them to in all instances. For example, if Petitioners offered to shift the prohibitive costs in this case, Respondents could effectively vindicate their federal statutory rights to seek damages under the antitrust laws through bilateral arbitration. And they would gladly do so.

Recognizing all this, the Second Circuit did not order class arbitration. The court below rightly

understood Respondents' argument to be simply that they could not effectively vindicate their federal antitrust rights under the arbitration clause because it prohibits any mechanism to shift or effectively share costs. And the court correctly agreed with Respondents that bilateral arbitration, under these terms, would impose prohibitive, non-recoupable costs on each individual claimant "as to preclude vindication" of their rights under the Sherman Act. Pet. App. 108a. The court left Petitioners to determine the proper means for enabling Respondents to vindicate their federal antitrust rights: The court "refrained from ordering the parties to submit to class arbitration, instead permitting Amex the choice between arbitration and litigation." Pet. App. 29a.

Therefore, application of the effective-vindication rule here does not conflict with this Court's class-arbitration decisions in *Concepcion*, 131 S. Ct. at 1750, and *Stolt-Nielsen*, 130 S. Ct. at 1776. It makes no difference to Respondents or to the effective-vindication doctrine whether Respondents are ultimately able to vindicate their federal claims through class litigation, class arbitration, bilateral arbitration with effective cost-shifting or cost-sharing, bilateral litigation with effective cost-shifting or cost-sharing, by Petitioners stipulating to their market power, or through some other alternative mechanism. All that matters is that Respondents have the opportunity to vindicate their federal antitrust rights. But given that the FAA generally favors enforcement of "private arbitration agreements ... according to their terms," *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford*

Jr. Univ., 489 U.S. 468, 478 (1989), absent a willingness by Petitioners to change those terms to allow for the vindication of rights in the arbitral forum, the only available course to share costs and vindicate the Sherman Act is class litigation in federal court.

Indeed, at all times, it is *Petitioners* who control whether the effective-vindication rule will affect their arbitration agreement. Petitioners could render the effective-vindication doctrine inapplicable to their agreements by ensuring some mechanism to share or shift costs.[7] And the choice is not between class litigation and class arbitration. Bilateral arbitration remains feasible if costs can be shared or shifted. For instance, the arbitration clause at issue in *Concepcion* provided that "[i]f the arbitrator awards the customer more than [AT&T's] last written settlement offer, then [AT&T] will pay the customer's attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that the attorney reasonably accrues for investigating, preparing, and pursuing the claim in arbitration." Br. for Pet'r at 7, *Concepcion*, 131 S. Ct. 1740 (2011), 2010 WL 3017755 (Aug. 2, 2010). Had Petitioners offered similar terms—either in the arbitration clause, or later during this lawsuit—Respondents undoubtedly could

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[7] In those cases where effective relief requires a market-wide injunction (such as the coordinated proceedings referred to in note 4, *supra*) the effective-vindication rule would further require the rescission of the provision in Amex's arbitration agreement that prohibits merchants from seeking in the arbitral forum any relief "on behalf of ... other [merchants]." Pet. App. 67a.

have pursued their treble damage actions effectively through bilateral arbitration, and we would not be here. At bottom, this case is not at all about class arbitration and therefore cannot possibly conflict with *Concepcion* and *Stolt-Nielsen*.

B. *Concepcion* Did Not Undermine the Effective-Vindication Rule.

Moreover, *Concepcion*'s reasoning does not implicitly undermine the effective-vindication rule. *Concepcion* held that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744; *see also id.* at 1751–53. Again, the effective-vindication rule does not condition the enforcement of arbitration agreements on the availability of class procedures. More fundamentally, though, *Concepcion* concerned a conflict between the FAA and a competing *state* law, while the effective-vindication rule reconciles the FAA with competing *federal* laws. The difference is fundamental.

Concepcion unambiguously was a case about preemption. The issue in *Concepcion* was whether a California state-law doctrine conditioning the enforceability of arbitration on the availability of class arbitration was consistent with the FAA. This Court explained that "nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," 131 S. Ct. at 1748. Because California's rule stood "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" the Court held that California's rule "is

preempted by the FAA." *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

That conclusion has no impact on the well-established effective-vindication doctrine. In a situation, like *Concepcion*, where federal and state laws conflict, the Supremacy Clause supplies the rule of decision for reconciling the conflict. And the rule is simple; federal law controls. *See* U.S. Cons. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."). But when two federal statutes are in tension, the Supremacy Clause (and, thus, *Concepcion*) is wholly irrelevant. Courts instead must develop rules to harmonize the two federal statutes, which stand on equal constitutional footing.

The effective-vindication doctrine is such a uniquely federal rule. It was first recognized when this Court first applied the FAA to federal statutory claims. *See supra* § I.A. That is no accident. Once the Court decided that federal statutory claims were not wholly outside the reach of the FAA, it became necessary to harmonize the FAA with the rest of federal law. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal*

Texts 180 (2012) (Harmonious-Reading Canon) ("[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").[8] Thus, consistent with the Court's approach in other areas of the law, this Court concluded in *Mitsubishi* that the FAA's general policy in favor of arbitration cannot be applied so woodenly as to eviscerate the specific antitrust protections of the Sherman Act. The Supremacy Clause has no bearing on that doctrine and thus *Concepcion* has no bearing on this case.

Indeed, Respondents do not contend that the FAA should yield to the effective vindication of competing state laws. *See Moses H. Cone Mem. Hosp*, 460 U.S. at 24 ("[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any *state* substantive or procedural policies to the contrary." (emphasis added)). But this Court should make clear that the uniquely federal effective-vindication doctrine continues to play a vital, if narrow, role.

C. The Effective-Vindication Rule Promotes Arbitration.

This Court's arbitration decisions confirm its "strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de*

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[8] Though the "harmonious-reading canon" is most often applied when interpreting provisions within a single statute, it is always this Court's "role to make sense rather than nonsense out of the *corpus juris*." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991). Thus, it is equally imperative that competing statutory regimes likewise be read to harmoniously co-exist.

Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989). The effective-vindication doctrine furthers the FAA's purpose by encouraging agreements that will actually result in parties "resolving disputes" in arbitration. It gives parties an incentive to negotiate agreements that allow for arbitration of federal statutory claims, as opposed to agreements that foreclose parties' ability to vindicate federal rights in arbitration. Petitioners' rule, by contrast, would provide companies (and particularly those with market power) clear incentives to employ contractual terms that ensure that federal statutory claims (and particularly antitrust claims) are never actually arbitrated.

While Petitioners invoke concerns about the widespread application of the effective-vindication doctrine, in fact, the rule only rarely applies. *See supra* § I.B. And the very existence of the doctrine may be part of the explanation for why it is so sparingly invoked to excuse compliance with an arbitration agreement. The rule itself creates incentives for parties to negotiate agreements that actually facilitate the vindication of federal rights in the arbitral forum. And agreements that provide mechanisms like cost-sharing, cost-shifting, or fee-shifting will almost certainly be immune from challenge under the effective-vindication doctrine.

In fact, the current trend appears to be in favor of better arbitration agreements with correspondingly less scope for the doctrine to apply. A recent empirical study of "37 current arbitration clauses" "confirm[s] that many large and well-known consumer-oriented companies have indeed added

'friendly' provisions to their arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising 'bounty' or premium payments to claimants who achieve a better outcome in arbitration than the company's last-best offer." Myriam E. Gilles, *Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion 4 (Jacob Burns Inst. For Advanced Legal Studies, Faculty Research Paper No. 372, Aug. 2012) (forthcoming 88 Notre Dame L. Rev. 825 (2013)).[9] These provisions protect the effective vindication of rights by ensuring that prohibitive costs will not foreclose meritorious claims.

The agreement at issue in *Concepcion* provides an example of such state-of-the-art, truly pro-arbitration agreements. As the Court noted, AT&T's arbitration clause in that case ensured that the Concepcions' claim "was most unlikely to go unresolved." 131 S. Ct. at 1753. Among other things, it "specifie[d] that ATT&T must pay all costs for nonfrivolous claims; ... and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages." *Id.* at 1744. And the agreement obligated the company to "pay the customer's attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that the attorney reasonably accrues for investigating, preparing, and pursuing the claim in arbitration," if the customer prevailed and the award

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[9] Professor Gilles's study is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132604.

was "more than [AT&T's] last written settlement offer." Br. for Pet'r at 7, *Concepcion*, 2010 WL 3017755. Given these provisions, it was likely that "the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action." 131 S. Ct. at 1753. "Because [AT&T] has committed to pay all arbitration costs and makes special premiums available in arbitration," the company explained in its brief to this Court, its arbitration agreement "'prompts [AT&T] to *accept liability*'—and to offer to settle for many times the customer's actual damages—'during the *informal claims process*' that precedes arbitration, 'even for claims of questionable merit.'" Br. for Pet'r at 10, *Concepcion*, 2010 WL 3017755 (quoting the district court's opinion) (emphasis in original).

Other companies have adopted similar provisions. For instance, Microsoft very recently added an arbitration clause to its services agreement that includes many of the pro-vindication provisions found in AT&T's agreement, including the promise to "reimburse any expenses (including expert witness fees and costs)" incurred in pursuing a claim that results in an award that is greater than Microsoft's last written offer.[10] Sovereign Bank has added a similar provision to its arbitration agreement for personal deposit account holders that agrees to "pay [claimants'] reasonable attorneys' and experts' fees if

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[10] Microsoft's agreement is available at http://windows.microsoft.com/en-US/windows-live/microsoft-services-agreement.

and to the extent [they] prevail."[11] And T-Mobile's arbitration agreement has evolved four times in less than a decade to include increasingly more pro-vindication terms. Under the company's current agreement, for all claims under $75,000, T-Mobile advances "administration and arbitrator fees" and entitles prevailing parties to "recovery of reasonable attorneys' fees and costs."[12]

If Petitioners' arbitration clause contained such pro-vindication clauses, Respondents would not be here. Most obviously, under the terms of Sovereign Bank's agreement, this case would not exist and the cost of this "effective-vindication" litigation would have never been expended. Similarly, Microsoft, AT&T, and T-Mobile's agreements would enable Respondents to vindicate their rights with the assurance that successful claims will not result in even greater economic losses. In all these scenarios, the FAA would function as intended. Arbitration would proceed according to the terms of a private agreement, without the foreclosure of any federal statutory claims.

Any company worried about the effective-vindication doctrine can avoid the doctrine by structuring their arbitration agreements as have AT&T, Sovereign Bank, the other companies

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[11] Sovereign Bank's agreement is available at http://www.sovereignbank.com/personal/docs/deposit-account-agreement-MA.pdf.

[12] T-Mobile's agreement is available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true.

referenced above, and no doubt scores of other businesses. Thus, the effective-vindication rule creates incentives for a virtuous cycle in which pro-vindication clauses become more prevalent, and the actual application of the effective-vindication rule by courts becomes even rarer. *See, e.g.*, Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 Notre Dame L. Rev. 1069, 1115–16 (2011) (describing the AT&T arbitration agreement as a "third-generation" arbitration clause that was aimed at compelling arbitration (like "first-generation" clauses), and prohibiting class-actions (like "second-generation" clauses), but also aimed at ensuring compliance with the effective-vindication doctrine). This virtuous cycle fully serves the purposes of the FAA, which favor the actual arbitration of claims according to the terms of private agreements, while in no way favoring the complete foreclosure of claims. In fact, some have suggested that, because of this trend toward arbitration clauses including "alternative incentives," the "specific facts" presented by this case are "unlikely to be repeated." Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (2012).

While the effective-vindication rule gets the incentives right by encouraging these pro-vindication provisions, Petitioners' proposed rule would have the opposite effect. Under Petitioner's view, there would be no incentive for companies to protect the vindication of rights through private agreements. While the effective-vindication rule is very rarely satisfied as it is, Petitioners would do away with it altogether, or at least limit it substantially. *See* Br.

for Pet'rs at 40–48 (characterizing the effective-vindication rule as *dicta*). Not only would Petitioners eliminate incentives for pro-vindication clauses, they would also create substantial incentives for companies to adopt less favorable agreements like the one at issue here. After all, the ability to enforce a clause that has the effect of providing *de facto* immunity for Sherman Act claims from direct purchaser businesses—the only plaintiffs with antitrust standing in most cases, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745–46 (1977)—is a powerful incentive indeed.

The choice between those competing incentives seems clear. The effective-vindication rule promotes a race to the top that ensures that the policies of both the FAA and the underlying federal statute are vindicated in the arbitral forum. Petitioners' rule would prompt a race in the opposite direction, encouraging arbitration agreements that frustrate the policies of the FAA and the underlying federal statutes by effectively exempting suspected antitrust violators from ever actually facing arbitration, and thus thwarting the "remedial and deterrent function" of the Sherman Act. *Mitsubishi*, 473 U.S. at 637.

III. The Effective-Vindication Rule Clearly Applies Here.

The undisputed facts of this case establish that Respondents cannot effectively vindicate their federal antitrust claims under the arbitration agreement. Uncontested expert analysis shows that it will cost each of these businesses several hundred thousand (if not millions) of dollars to prove their claims. But each individual Respondent's likely recovery is

several hundred thousand dollars less than the likely cost of pursuing their claims. That dynamic would not be fatal if the agreement allowed some mechanism to share or shift the expert's costs. But Petitioners' arbitration clause forecloses any effective means for sharing or shifting those prohibitive costs. Thus, under the arbitration clause in this case, for Respondents to recover the economic losses caused by Petitioners' anticompetitive behavior, they would be forced to incur far greater economic losses. While there are federal claims that could be vindicated under this agreement, and agreements (like AT&T's) that would permit bilateral arbitration of Respondents' claims, the combination of these claims, this agreement, and Respondents' uncontested showing of costs make this the rare case in which the effective-vindication doctrine's heavy burden is met.

A. Respondents Face Prohibitive Costs that Prevent Them from Effectively Vindicating Their Antitrust Claims in the Arbitral Forum.

It is uncontested that Petitioners' arbitration clause prevents the sharing or shifting of expert fees and other costs necessary to prove Respondents' antitrust claims. With respect to cost-sharing through collective action, the clause provides that claimants "will not have the right to participate in a representative capacity or as a member of any class of claimants pertaining to any claim subject to arbitration." Pet. App. 35a–36a (all caps omitted). The agreement similarly dictates that there is "no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims

brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated." Pet. App. 36a. The agreement also prohibits the joinder or consolidation of claims in arbitration. *See* Pet. App. 36a.

Nor can claimants pool their resources outside of arbitration to prepare expert testimony for use in their respective one-on-one proceedings as Petitioners suggest (50–51). Any such expert report or testimony would be based on information produced in one or more of the bilateral arbitration proceedings. And as the Second Circuit held in rejecting the same suggestion by Petitioners below, the arbitration agreements expressly prohibit sharing that information with other claimants. Pet. App. 92a (each bilateral "arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party"); *id.* ("[A]ny proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.").

Even absent confidentiality concerns, Petitioners raised this speculative possibility too late and with no factual support. Confronted in the district court with Respondents' factual showing of prohibitive costs, Petitioners never suggested that costs could be pooled outside class proceedings. And even now, they

fail to sketch any plausible scenario under which far-flung claimants might pool resources to engage a single circuit-riding expert who would retail a single report in a series of independent arbitrations. Much less did they respond, in the district court, to Respondents' evidentiary showing with any evidence of their own that the merchant plaintiffs could in fact vindicate their rights in such a fashion. They offer no more than mere speculation, which is not enough to rebut Respondents' concrete facts. *See Randolph*, 531 U.S. at 92 (holding that, once a plaintiff meets her evidentiary burden under the effective-vindication rule, "the party seeking arbitration must come forward with contrary evidence").[13]

The agreement also precludes any shifting of expert costs to Amex. Unlike the agreement in *Concepcion*, Petitioners' arbitration agreement does not offer to shift "any expenses[] that [Respondents'] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration." Br. for Pet'r at 7, *Concepcion*, 2010 WL 3017755. The rules of the arbitral bodies designated in the agreement do not award costs unless they are

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[13] Moreover, Petitioners are wrong to suggest (at 50) that this case involves "small-value claims." This is a serious dispute between commercial parties, with some of the largest named plaintiff retailers pursuing claims worth nearly $40,000. Those claims are small only in comparison to the very substantial costs of an economic expert. In reality, especially considering the sheer number of businesses subject to Petitioners' anticompetitive conduct, this is precisely the sort of "dispute[] concerning commercial contracts" that Petitioners seek to distinguish. Br. for Pet'rs at 50 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)).

authorized by the applicable fee-shifting statute, COA App. at 720, which is not the case here. *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 94 (1991) (explaining that antitrust statutes do not "permit a shift of expert witness fees"); *Crawford Fitting Co.*, 482 U.S. at 439 (holding, in an antitrust case, that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary"). Nor have Petitioners offered, during the course of this litigation, to bear Respondents' necessary costs or enter stipulations that would obviate the need for an expert. *Cf. Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298–300 (5th Cir. 2004) (effective-vindication argument "mooted by Countrywide's representation to the district court that it would pay all arbitration costs").

It is also uncontested that, without the ability to share or shift those costs, individual Respondents cannot pursue their federal antitrust claims. At trial, Respondents submitted an extensive expert affidavit by Dr. Gary L. French "concerning the likely costs and complexity of an expert economic study concerning the liability and damages" sought in Respondents' federal tying claims compared to individual Respondents' "potential recovery of damages." *See* JA 88; Pet. App. 86a–87a. Crucial to this analysis is that to prove their tying claim Respondents must commission an antitrust study by a reputable economic expert. *See supra* pp. 7–8 (listing the components of this required antitrust study). "Due to the complexity and analytical intensity of an antitrust study, total expert fees and

expenses usually are substantial, even in a non-class action involving an individual plaintiff." JA 88; Pet. App. 87a. In Dr. French's experience, "even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million." JA 88; Pet. App. 87a. Based on the allegations in Respondents' complaint and preliminary research, Dr. French estimated that the cost of an economic antitrust study for Respondents' claims would fall in the middle range between $300,000 and $2 million. *See* JA 88–89; Pet. App. 87a–89a. Petitioners did not contest this expert analysis.

Dr. French then calculated individual Respondents' likely recoveries. He "estimated that a small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation." JA 92; Pet. App. 88a; *see also* JA 94 t.1. "Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period." JA 92; Pet. App. 88a. The "median volume merchant" named in this case, "having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled." JA 92; Pet. App. 89a. "The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled."

JA 92; Pet. App. 89a. Again, Petitioners did not contest any of these conclusions.

Dr. French's expert analysis proves that Respondents cannot vindicate their antitrust rights under the arbitration agreement. *See* JA 93. Because the agreement forecloses every practicable avenue for cost-sharing or cost-shifting, each individual Respondent will be forced to expend hundreds of thousands (if not millions) of dollars to establish the essential elements of a roughly ten-thousand-dollar claim (including trebled damages). Even the highest volume named plaintiff, paying the lowest possible cost for an antitrust report, will lose over a quarter million dollars pursuing its claim under the Amex agreement. That means each named plaintiff *will* be a net loser—to the tune of hundreds of thousands of dollars—under the arbitration agreement and therefore cannot vindicate its rights under the agreement. Enforcing the arbitration agreement in the face of these uncontested facts will not compel arbitration, but will compel Respondents to drop their claims and grant Petitioners *de facto* immunity from many millions of dollars in federal antitrust liability.

B. The Prohibitive Costs Respondents Face Are Real, Not Speculative.

Unlike the claimant in *Randolph*, Respondents have shown much more than the mere "risk" that they would each bear the prohibitive, non-recoverable costs required to prove their antitrust claims. Dr. French's expert affidavit establishes with certainty that Respondents must incur prohibitive costs to prove their federal statutory claims and that, without

a cost-sharing mechanism, those costs will dwarf any possible recovery. Petitioners did not dispute the content of the affidavit. And the court below found it to be credible and to provide concrete facts that prove Respondents will not be able to vindicate their rights in the arbitral forum. *See* Pet. App. 27a ("We again find Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions .... The enforcement of the [arbitration agreement] flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." (internal quotation and alteration marks omitted)).

Petitioners' suggestion (at 50) that an economic antitrust study might not be required in this case is wrong for many reasons. Most fundamentally, Petitioners never pressed this below and thus forfeited the argument. Nor could they credibly argue that no study is required. Under settled law, to prove their tying claims, Respondents must define the relevant market, prove market power, prove that Petitioners used market power in furtherance of its tying scheme, prove anticompetitive effects, and calculate damages. *See, e.g.*, *Illinois Tool Works v. Independent Ink*, 547 U.S. 28, 46 (2006) ("[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."). Petitioners have never stated a willingness to stipulate to any of these critical facts, and it is incredible to suggest they could be established without an extensive expert report. In fact, Petitioners are careful not to say anything of the sort. Rather, in a mirror image of the speculation

rejected in *Randolph*, Petitioners suggest only that "[w]hether each claimant would have to submit a complex and costly economics expert report is a decision for the arbitrator." Br. for Pet'rs at 50.

But whether a formal report is required is not the point. Arbitration may be more informal than litigation, but that does not translate into allowing cut-rate economic analysis to go unchallenged or dispensing with necessary elements of Respondents' statutory claims. Petitioners have steadfastly retained the right to contest critical elements of Respondents' claims. Respondents therefore must establish them through extensive, costly economic analysis, whether embodied in a report or not. And the cost of that expert evidence is prohibitive in light of the nature of the claims and the foreclosure of any means to share or shift the cost.

To be clear, this is not a matter of mere lowered incentives. Respondents brought their claims to recover economic losses that result from Petitioners' ongoing anticompetitive behavior. But under Petitioners' arbitration agreement, each individual Respondent can recover their losses only by incurring significantly greater economic losses. No rational business would engage in such self-destructive behavior. And Respondents would not do so here.

This result would be particularly troubling in the antitrust context, where effective private enforcement serves important public functions. *See, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 n.2 (1997) (Scalia, J., concurring in part and dissenting in part) (The federal antitrust laws are "designed to ... bring to bear the pressure of 'private attorneys

general' on a serious national problem for which public prosecutorial resources are deemed inadequate."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."). Indeed, in most antitrust contexts, evidence that the defendant successfully insisted on inserting clauses that preclude any enforcement of the antitrust laws would itself be evidence of market power and anticompetitive conduct. *Cf. Redel's Inc. v. General Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) ("Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.'"). To read such clauses to foreclose any antitrust inquiry whatsoever would truly put the FAA and the Sherman Act on an unnecessary collision course. *Cf. Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 329 (1955) ("[A] parti l immunity from civil liability for future violations" is inconsistent with "the antitrust laws.").

This is not to say, of course, that antitrust claims should never be subject to arbitration. *See Mitsubishi*, 473 U.S. at 637; Pet. App. 29a ("We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions."). For most antitrust claims, under most arbitration agreements, the effective-vindication rule will be irrelevant; mine-run federal antitrust claims can be enforced through arbitration. *See Mitsubishi*, 473 U.S. at 633 ("[T]he vertical restraints which most frequently give birth

to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability.").[14] But in the rare case where an arbitration clause forecloses complex, costly antitrust claims—especially where, as here, those claims involve industry-wide distortions—the effective-vindication rule ensures that federal antitrust statutes "will continue to serve both [their] remedial and deterrent function[s]." *Mitsubishi*, 473 U.S. at 637.

* * *

In the final analysis, the narrow issue presented here, based on an uncontested evidentiary record about a particular antitrust claim under a specific arbitration agreement, should not be difficult to resolve. From the very first case in which this Court held that federal statutory claims are within the reach of the FAA, it has emphasized as a necessary precondition that the federal claims must be capable of vindication in the arbitral forum. The rule is not only longstanding, but necessary to harmonizing the FAA with other federal statutes and to vindicating the policies of the FAA itself, which is pro-arbitration in the sense of wanting arbitration to occur.

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[14] Indeed, Respondents are *not* arguing, like the plaintiffs in *Gilmer*, that "the fact that [a federal statute] provides for the possibility of bringing a collective action ... mean[s] that individual attempts at conciliation were intended to be barred." 500 U.S. at 32. Rather, Respondents have shown that, on the specific facts of this case, Petitioners' specific arbitration agreement would prevent the effective vindication of Respondents federal statutory claims.

Recognizing that the narrow effective-vindication rule applies here is faithful to the entirety of this Court's FAA jurisprudence involving federal statutes and maintains healthy incentives for parties to agree to arbitration agreements that allow federal claims to be vindicated. The alternative is to remove the linchpin that has allowed this Court to reverse the rule of *Wilko* and to enforce the policies of the FAA in the vast majority of federal statutory cases. But the reasons for the caveat that the FAA commands arbitration if, but only if, the federal claims can be effectively vindicated in the arbitral forum are as sound as ever. And applying that doctrine to the uncontested record here, Respondents have clearly met their burden and thus should not be foreclosed from vindicating their Sherman Act claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

The Sherman Antitrust Act

Section 1, 15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Sherman Antitrust Act

Section 2, 15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Federal Arbitration Act

Section 2, 9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Federal Arbitration Act

Section 3, 9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

The Federal Arbitration Act

Section 4, 9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear

and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

REPLY BRIEF

RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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February 15, 2013

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page iii of their opening brief, and there are no amendments to that Statement.

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Respondents argued below – and the Second Circuit held – that the merchant plaintiffs' inability to pursue their antitrust tying claims as a "collective action" rendered their agreement to arbitrate unenforceable. That argument and holding conflict with the FAA and this Court's decisions in *Concepcion* and *Stolt-Nielson*, and find no support in the Court's earlier statements in *Randolph* and *Mitsubishi*. Section 2 of the FAA and this Court's decisions make clear that, when a party agrees to forgo court procedures in favor of bilateral arbitration, such agreements must be enforced, including as to federal claims, absent a clear direction *from Congress* that particular claims are not appropriate for arbitration. Respondents cite nothing in the FAA or the Sherman Act that would authorize a court to override their agreement.

Rather than rely on any statutory provision, respondents, joined by the United States, ask this Court to fashion an "effective vindication" exception to the FAA – an exception that respondents improbably contend applies only to federal but not state-law claims – that would allow courts to decide, based on the self-interested predictions of parties and their paid experts, that a federal claim will be too expensive or risky to pursue in bilateral arbitration. But nothing in this Court's precedents suggests that an otherwise enforceable agreement becomes unlawful when the parties' *ex ante* procedural choices allegedly make it unattractive, *ex post*, to pursue a particular claim. In no prior case has this Court embraced the notion that for every potential federal statutory claim there must be a procedural path in which the risk-adjusted rewards exceed the potential costs. No such principle governs even in litigation, much less

has it been held to override valid arbitration agreements.

Respondents attempt to equate their "effective vindication" principle with a rule against prospective waiver of federal statutory claims, but the bilateral arbitration agreement at issue here is not in form or in substance a prospective waiver of any federal claim. The arbitrators are bound to apply federal antitrust law, and petitioners conduct their business with that knowledge (and under continued scrutiny by state and federal enforcers as well). As this Court held in *Vimar Seguros* and *CompuCredit*, although arbitral procedures may affect a party's practical ability to pursue its claim, the claimant's *substantive* rights remain intact as long as the "*guarantee of the legal power to impose liability*" is preserved. *CompuCredit*, 132 S. Ct. at 671; *see* Pet. Br. 24-27.

Furthermore, nothing in the arbitration agreement prevents plaintiffs from doing exactly what they now claim (at 35) they would "gladly" do, namely, engage in bilateral arbitration and share costs and otherwise cooperate in pursuing their cases. To the extent the Second Circuit suggested such options were foreclosed, it misinterpreted the language of the agreement and ignored petitioners' express concession that such cost-sharing was permitted. And respondents ignore their own insistence below that nothing less than class procedures would allow them to "effectively vindicate" their claims.

All such issues, however, "must be decided in the first instance by the arbitrator." *Vimar Seguros*, 515 U.S. at 540. It would be wholly unworkable for district courts, before deciding whether to enforce an arbitration agreement, to hold a mini-trial on the costs and benefits of arbitration and to speculate

about what procedures will apply and what evidence might be required. Any such threshold inquiry will also reopen the door to the very "judicial hostility" to arbitration this Court has condemned. "[T]he national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Mitsubishi*, 473 U.S. at 638. Respondents' anticipatory concerns about the adequacy of bilateral arbitration procedures do not constitute grounds to refuse to "permit[] the arbitration to go forward." *Id.* at 638.

ARGUMENT

I. THE SECOND CIRCUIT'S INVALIDATION OF THE PARTIES' ARBITRATION AGREEMENT DUE TO THE CLASS-ACTION WAIVER CONTRAVENES THE FAA AND THIS COURT'S PRECEDENTS

The record below belies respondents' contention (at 38) that this case is "not at all" about class proceedings. As the Second Circuit repeatedly stated, "the only issue before us is the narrow question of whether the class action waiver provision . . . should be enforced." App. 3a (*Amex III*); *see also, e.g.*, App. 32a (same in *Amex II*); App. 58a, 85a (same in *Amex I*). That "narrow question" was precisely the one raised by respondents in the district court and on appeal.[1] And that is the question on which this Court granted certiorari. Pet. i.

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[1] *See* Opp. to Mot. To Compel 11 (6/21/04) ("The sin of the agreements . . . is that they bar collective action."); Pls.' C.A. Br. 17 (9/11/06) ("[t]he district court erred in failing to hold the collective action ban unenforceable").

Respondents never argued, as they do now (at 36), that the defect in the arbitration agreement was the absence of "some other alternative mechanism," such as "cost-shifting" or "cost-sharing," to facilitate their claims in *bilateral* arbitration. In fact, respondents expressly argued that cost-sharing and cost-shifting would be inadequate without the prospect of a large aggregate recovery. *See infra* pp. 19-20.

The decision below – which refused to enforce the arbitration agreement because it did not allow for class proceedings – should be reversed because it is contrary to the FAA and this Court's decisions in *Concepcion* and *Stolt-Nielsen*.

A. The Parties' Arbitration Agreement Is Enforceable Under FAA § 2

The FAA's text forecloses the Second Circuit's refusal to enforce the parties' arbitration agreement. Pet. Br. 20-22. FAA § 2's enforcement mandate does not distinguish between federal and state-law claims; as respondents concede, this Court has long held that it applies with full force to federal statutory claims. *See, e.g.*, *CompuCredit*, 132 S. Ct. at 669; *Mitsubishi*, 473 U.S. at 625. Although § 2's "saving clause" preserves generally applicable *state-law* contract-revocation doctrines, it does not authorize the creation of new federal common-law contract defenses. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). And it does not tolerate defenses that single out arbitration for special scrutiny, as respondents' "effective vindication" rule does. *See Doctor's Assocs.*, 517 U.S. at 687.

Respondents' sole textual argument (at 23) is that the phrase "provision . . . to settle by arbitration" impliedly excludes from FAA § 2 any agreement that would effectively prevent the vindication of a federal

claim. But a "provision . . . to settle by arbitration" is simply an "agreement to arbitrate," and § 2 makes such agreements enforceable subject only to the saving clause. If Congress had meant to carve out such an exception to § 2, it would have said so, as it did in the ensuing "saving clause." *Cf. CompuCredit*, 132 S. Ct. at 672.

Moreover, respondents' interpretation contradicts *Concepcion*. If § 2 precluded enforcement of arbitration procedures that could result in the "complete elimination of claims," Resp. Br. 23, the *Discover Bank* rule – which was grounded in "California's policy against exculpation," *Concepcion*, 131 S. Ct. at 1746 – would not have been preempted by § 2: at most, it would have been narrowed. And respondents never explain why Congress would have intended to treat state-law claims differently from federal claims in this regard. *See infra* pp. 9-10.

B. Congress, Not the Courts, Has Authority To Override FAA § 2

1. Respondents' argument that this Court is authorized to create an implied exception to the FAA based on the Sherman Act has no basis in either statute and is contrary to this Court's repeated holdings that Congress alone may override the FAA.

In *Mitsubishi*, the Court held that agreements to arbitrate federal statutory claims are enforceable absent some congressional command to the contrary: "Having made the bargain to arbitrate, the party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 473 U.S. at 628 (emphasis added). *Mitsubishi*'s holding has become a foundational principle of this Court's FAA § 2 jurisprudence. *See Gilmer*, 500 U.S. at 26 (quoting

Mitsubishi); *Randolph*, 531 U.S. at 90 (same); *Pyett*, 556 U.S. at 258 (same); *see also Shearson/American Express*, 482 U.S. at 227.

As this Court reiterated in *CompuCredit*, which respondents ignore, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies." 132 S. Ct. at 672 n.4 (internal quotations omitted; alterations in original). Congressional "silen[ce]" is insufficient. *Id.* at 673. Respondents do not even attempt to shoulder this burden.

The requirement of an affirmative congressional override is essential to the FAA's purposes. As this Court repeatedly has held, the FAA was enacted to curtail courts' ability to invalidate arbitration agreements based on "judicial hostility." *E.g.*, *Concepcion*, 131 S. Ct. at 1747; *CompuCredit*, 132 S. Ct. at 668; *Gilmer*, 500 U.S. at 24. Permitting courts to read into any federal right of action an implied exception to § 2 – as the government urges this Court to do – would revive and give free rein to the old judicial hostility to arbitration.

2. The requirement of congressional override also correctly applies this Court's doctrine of implied repeal. Contrary to respondents' suggestion (at 20), the implied-repeal doctrine does not allow courts to disregard a law enacted by Congress whenever they perceive a tension between the policies of two federal statutes. Rather, "'[w]hen two statutes are capable of co-existence,' . . . 'it is the duty of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective.'" *Vimar Seguros*, 515 U.S. at 533 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (emphasis added). Moreover, the intention to repeal "must be clear and manifest."

Morton, 417 U.S. at 550-51 (internal quotations omitted).

The FAA and the Sherman Act are capable of coexistence. Arbitration and antitrust claims are not "inherently" inconsistent. *Mitsubishi*, 473 U.S. at 633. Although private lawsuits are one facet of the antitrust enforcement regime, the Sherman Act leaves such private claims – and the procedures by which they will be resolved – "at all times under the control of the individual litigant." *Id.* at 636.

Respondents do not dispute that Congress has not expressed *any* intention to make class procedures for Sherman Act claims non-waivable – even as to claims that might otherwise be uneconomical to bring individually. The absence of any affirmative expression of intent by Congress is dispositive under *CompuCredit*.

Indeed, Congress decided not to add class proceedings in 1890, even for "small" consumer claims. *See* Pet. Br. 7. In view of that history, it is impossible to argue, as required by *Mitsubishi*, 473 U.S. at 628, that Congress "evinced an intention" in the Sherman Act to preclude parties from waiving class procedures for those claims. Rather than dispute this point, respondents (at 27) dismiss it as "irrelevant" because Rule 23 permits class proceedings under certain circumstances. But in arbitration the parties, not the Federal Rules, determine the "rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. Absent some congressional indication that class procedures are necessary for Sherman Act claims, the court below had no authority to invalidate the parties' arbitration agreement because it did not allow such procedures.

C. The Decision Below Contravenes *Concepcion*

1. Respondents' contention (at 35) that the decision below is consistent with *Concepcion* because it "does not order class arbitration" disregards *Concepcion*'s express holding. In finding the *Discover Bank* rule preempted, this Court broadly held that FAA § 2 prohibits courts from refusing to enforce arbitration agreements due to the absence of class procedures. *See* 131 S. Ct. at 1744. That is what the court below did here. *See* Pet. Br. 37-38.

Respondents also disregard *Concepcion*'s reasoning. As this Court made clear, class arbitration would undermine "streamlined proceedings and expeditious results." 131 S. Ct. at 1749 (internal quotations omitted). Refusing to enforce an arbitration agreement due to the lack of class procedures interferes with Congress's objectives because it allows plaintiffs to demand class arbitration "*ex post*," which in turn will force defendants to abandon arbitration altogether. *Id.* at 1753.

2. The United States argues (at 31-32) that *Concepcion*'s holding depended on the existence of "plaintiff-friendly" provisions in AT&T Mobility's arbitration clause. But *Concepcion* specified that its holding applies "*even if*" – not "unless" – "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753 (emphasis added). If the United States were correct, the Court would have *narrowed*, not preempted, the *Discover Bank* rule. In any event, plaintiffs here are pursuing claims worth thousands of dollars – which they concede are not "small-dollar" claims – and plaintiffs now have abandoned the argument (made repeatedly below) that class proce-

dures are the only means by which they can vindicate their claims. *See infra* pp. 19-20.

3. Respondents (half-heartedly supported by the United States) dismiss *Concepcion* as relating only to preemption of state law. Resp. Br. 40; U.S. Br. 32. But nothing in the FAA or this Court's decisions supports that distinction.

Concepcion predicated its preemption holding on its interpretation of FAA § 2 as compelling enforcement of the parties' arbitration agreement even when they have agreed to forgo class-action procedures. By its terms and under this Court's precedents, there is no arguable basis in § 2 for respondents' argument that the FAA treats federal claims differently from state-law claims. *See supra* p. 4.

Concepcion's reasoning also applies equally to federal and state-law claims. Refusing to enforce arbitration agreements because they preclude class proceedings frustrates the FAA's objectives whether federal or state-law claims are involved. Indeed, the *Discover Bank* rule, though a state-law contract defense, had been applied to deny arbitration of federal statutory claims. *See* Pet. Br. 39. *Concepcion* did not purport to preserve the *Discover Bank* rule in such situations. It preempted the rule across the board.

Respondents' argument also ignores *Stolt-Nielsen*, upon which this Court drew heavily in *Concepcion*. The Court in *Stolt-Nielsen* rejected judicial policy concerns about "negative value claims" in the context of Sherman Act claims. 130 S. Ct. at 1769 n.7. *Stolt-Nielsen* thus supports the conclusion that *Concepcion*'s holding is not properly limited to state-law claims. Rather, *Concepcion* stands broadly for the proposition that courts may not invalidate arbitra-

tion agreements because they forbid class procedures – even when federal claims are at issue.

4. Limiting *Concepcion* to state-law claims would undermine the FAA's objectives. Creative lawyers could readily conjure up a federal statutory cause of action if that would allow them to evade *Concepcion*. Plaintiffs have already begun doing so. *See* U.S. Chamber et al. Cert. Br. 7-8. It is critical for the Court to interpret the FAA uniformly to "discourage litigants from manipulating their allegations" to evade its mandate. *Rodriguez de Quijas*, 490 U.S. at 485.

Also, it makes "little sense for similar claims, based on similar facts," to be split between arbitration and litigation. *Id.* Such duplicative proceedings will lead not only to inefficiency, but also to inconsistent results between virtually identical state and federal claims. *See* Pet. Br. 40. Respondents offer no response to this point.

II. RESPONDENTS' EFFORT TO STITCH TOGETHER A BROAD "EFFECTIVE VINDICATION" EXCEPTION DISTORTS *MITSUBISHI* AND *RANDOLPH*

Respondents ask this Court to declare a new "effective vindication" exception to the enforcement of arbitration agreements. But even sympathetic commentators have acknowledged that this argument is a gambit by "creative plaintiffs' lawyers" to resurrect, in even broader form, the unconscionability challenge that this Court held contrary to the FAA in *Concepcion*.[2] Nothing in *Mitsubishi* or *Randolph* supports that result.

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[2] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L.

A. *Mitsubishi*'s "Effective Vindication" Language Does Not Authorize Courts To Decline To Enforce Bilateral Arbitration Agreements

Respondents rest (at 18) virtually their entire case on *Mitsubishi*'s comment that, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. at 637. They interpret that statement to authorize federal courts to invalidate arbitration agreements if they do not guarantee procedural rules that make plaintiffs' claims economically attractive to pursue on a risk-adjusted basis.

Respondents' interpretation of *Mitsubishi*'s language is at odds with the main thrust of that decision. *Mitsubishi* reversed this Court's earlier hostility toward arbitration of federal claims, which was rooted in skepticism that bilateral arbitration procedures would be adequate to vindicate federal policies. *See Wilko*, 346 U.S. at 432, 435-36. Instead, *Mitsubishi* embraced bilateral arbitration of federal antitrust claims due to its "adaptability and access to expertise," its ability to "keep the effort and expense required to resolve a dispute within manageable bounds," and the demonstrated benefits of "streamlined proceedings and expeditious results" even in complex federal cases. 473 U.S. at 633.

Mitsubishi did not hedge in holding that bilateral arbitration is consistent with federal substantive law. The Court made a "flat statement" that, "'[b]y agreeing to arbitrate a statutory claim, a party does

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Rev. 373, 376, 406 (2005) (noting that plaintiffs' lawyers came up with the "effective vindication" theory after unconscionability challenges "met with failure").

not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Rodriguez de Quijas*, 490 U.S. at 481 (quoting *Mitsubishi*, 473 U.S. at 628). And, as discussed above, it held that bilateral arbitration agreements must be enforced unless "Congress itself" has evinced a contrary intention. 473 U.S. at 628.

As respondents concede (at 25), moreover, *Mitsubishi*'s "effective vindication" language related to the "substantive preclusion of federal statutory claims," not the adequacy of arbitration procedures. *See* Pet. Br. 45-48. Respondents' effort to expand that language to procedural rules that might impede the cost-effective prosecution of claims proves far too much. Even in litigation, there are no guarantees that plaintiffs will have procedural mechanisms that allow them to pursue their claims at a cost that is lower than their expected recovery, particularly when adjusted for the risk of loss. For example, the "American Rule" presumptively precludes plaintiffs from recovering the costs of enforcing their claims, even if they prevail. *Fox*, 131 S. Ct. at 2213. Federal law allows for some fee- and cost-shifting, but it caps the amount and types of awardable costs. 28 U.S.C. §§ 1821, 1920.

Federal law thus does not guarantee plaintiffs recovery of the transaction costs of pursuing their claim. Yet this Court never has suggested that these procedural limits may be overridden in the name of the "effective vindication" of federal statutory policies – even when they make small claims not worth pursuing. When it believes special rules are needed, Congress takes those matters into its own hands, by enacting treble damages, special cost-shifting provi-

sions, or other measures to further facilitate claims. *See, e.g.*, *Mitsubishi*, 473 U.S. at 636.

There is no basis in the Sherman Act or in this Court's decisions for treating the class-action mechanism as sacrosanct. Prior to 1938, class actions were not generally available in damages actions. *See* Pet. Br. 5. The Sherman Act's framers thus had no expectation that class actions would be available to help spread the costs of private suits. After 1966, class actions became more widespread. But often they remain unavailable due to Rule 23's strictures, which apply even where denying class treatment would "effectively frustrate [plaintiff's] attempt to vindicate the policies underlying [federal statutory] laws." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974).

The same is true in arbitration. The FAA promotes the freedom of parties to "structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 57. Congress, of course, can override or limit private arbitration if it concludes its benefits should yield to other substantive aims, just as it can modify other generally applicable procedures for particular statutory contexts. *See supra* pp. 5-6. But *Mitsubishi* did not adopt the extreme proposition that federal *courts* may invalidate otherwise agreed-upon procedural rules on the basis of implied federal statutory policies whenever they believe those rules unduly impede plaintiffs from pursuing their claims. *Mitsubishi*'s "effective vindication" language stands only for the proposition that, as long as arbitration provides an alternative forum in which federal substantive law will be applied to the parties' dispute, the policies of both the FAA and the underlying federal statute are properly served. *See* Pet. Br. 47-48.

B. *Randolph* Did Not Create a Broad "Effective Vindication" Rule

Randolph expressly declined to address whether the lack of a class-action mechanism rendered an arbitration agreement unenforceable. *See* Pet. Br. 44. Respondents cannot explain how *Randolph* is properly read to answer a question it never considered.

Moreover, the portion of *Randolph* on which respondents rely was *dicta*, as even the Second Circuit acknowledged. App. 22a. *Randolph*'s actual holding was that an arbitration agreement need not "affirmatively protect a party from potentially steep arbitration fees," and "silence" on which party will bear such fees "does not render the agreement unenforceable." 531 U.S. at 82. That was all the Court needed to hold to decide that the plaintiff's challenge to the agreement was "plainly insufficient." *Id.* at 91.

Furthermore, the Court did not indicate, even in *dicta*, that high costs would render an agreement to arbitrate unenforceable. Randolph "contend[ed]" that, because of a risk of high arbitration costs, she was "unable to vindicate her statutory rights in arbitration." *Id.* at 90. In observing that it "may well be" that large arbitration costs could have that effect, *id.*, the Court simply acknowledged that Randolph might, on an appropriate showing, be able to establish the *factual predicate* for her legal contention. But the Court never considered (let alone endorsed) that legal contention, because it held that, on the record before it, Randolph had made no "showing at all" on the factual point. *Id.* at 90-92. Thus, *Randolph* did not even suggest an answer to the question whether and, if so, in what circumstances an arbitration agreement can be invalidated based on a "prohibitive costs" showing.

This Court should not embrace respondents' reading of *Randolph*. It is critical to the FAA's core objectives that arbitrability be a straightforward determination free of undue cost or delay. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22 (noting "Congress's clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). A fact-intensive threshold standard – which would require evidentiary presentations and contested fact-finding to allow a court to anticipate all the costs of the actual proceeding (balancing those costs against the risk-adjusted potential returns) – will spawn routine arbitrability mini-trials that will undermine the value of *all* arbitration agreements. *See Vimar Seguros*, 515 U.S. at 536 ("It would be unwieldy and unsupported by the term or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier."). The Court in *Randolph* never suggested that such an inquiry was appropriate.

If the Court were to accept, or leave open the possibility of, a "prohibitive costs" exception to the FAA, it should clearly limit that exception to arbitration-specific fees and other special costs of "admission" to the arbitral forum. *See* Pet. Br. 41-42. Respondents concede (at 25) that *Randolph* itself addressed only those costs. They also do not dispute that the overwhelming majority of federal circuits have applied *Randolph* only to threshold costs of "access." *See* Pet. Br. 42-43. Expanding the "prohibitive costs" inquiry to allow plaintiffs to invalidate arbitration agreements based on costs that are neither related to access nor unique to arbitration would be, as the

Court noted in *Vimar Seguros*, "unwieldy and unsupported by the terms or policy of the statute." *See infra* pp. 17-18.[3]

C. Respondents' "Effective Vindication" Rule Would Thwart the FAA in a Broad Range of Cases

Respondents' "effective vindication" rule is an extremely "broad rul[e]" that will undermine bilateral arbitration agreements in innumerable cases. App. 137a (Jacobs, J.). Respondents do not dispute that the Second Circuit's rule is even broader than the *Discover Bank* rule, which rendered unenforceable "virtually any consumer arbitration contract without regard to the contract's terms." U.S. Br. 31; *see* Pet. Br. 32-34.

1. Respondents' repeated claim (at 15) that their "effective vindication" rule is "exceedingly narrow" is not credible. *First*, respondents argue (at 29) that the evidentiary burden is "very high." But this case proves the opposite. All it took was an 11-paragraph declaration by plaintiffs' hired expert, uncritically accepted by the Second Circuit, to invalidate the parties' agreement. The record here confirms that respondents' vague test is an invitation to reignite courts' hostility toward arbitration agreements. *See infra* pp. 20-23.

Second, respondents argue (at 33) that only two circuits in "[t]wenty years of lower court decisions" have found the "effective vindication" rule satisfied. That is highly misleading, because those are the only two appellate decisions to have refused to limit *Ran-*

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[3] The plaintiffs in *Concepcion* unsuccessfully proposed just such an expansion of *Randolph*'s effective-vindication language. Brief for Respondents 51, *Concepcion*, *supra* (No. 09-893).

dolph's "prohibitive costs" *dicta* to filing fees and other threshold arbitration costs. *See* Pet. Br. 42-43. What is more telling is that, during *Amex*'s short lifetime, plaintiffs have routinely mounted "effective vindication" challenges and have repeatedly prevailed in the district courts in the Second Circuit. *See* U.S. Chamber et al. Br. 20. If the rule is accepted by this Court, invalidation of arbitration agreements will become routine in every circuit.

Third, notwithstanding their contrary assertion (at 32), respondents' theory would allow plaintiffs to avoid arbitration for a wide range of claims. As the United States acknowledges (at 33), there are a "wide range of . . . federal statutes" that "predictably generate only small damages awards for any particular plaintiff." Even as to larger claims, respondents' rule will lead to invalidation of bilateral arbitration agreements any time a plaintiff can identify an arguable need for a detailed expert report. In the antitrust area, for example, that would allow parties to avoid bilateral arbitration agreements in any case requiring a market-definition or market-power analysis – a broad swath of the antitrust landscape. *See* Antitrust Scholars Br. 24-27.

Fourth, the Second Circuit held that, in making their cost-benefit analysis, "plaintiffs must include the risk of losing." App. 91a. Thus, even if the potential recovery would exceed the likely costs incurred in arbitration, class procedures may still be required if the risk-adjusted recovery does not. The United States (at 26 n.3) also appears to embrace this reasoning, which – taken to its untenable conclusion – would mean that the more frivolous (and risky) the claim, the greater the need for class proce-

dures to make plaintiffs' (and their lawyers') gamble worthwhile.

Finally, respondents deny (at 32) that their test will require burdensome upfront litigation because it boils down to "whether the nonrecoupable costs that must be incurred in arbitration, but could be avoided or spread in litigation, exceed the plaintiff's potential recovery." But those variables are highly uncertain, especially when adjusted for risk. Moreover, they are subject to the divergent opinions and predictions of parties and their paid experts.

Respondents criticize (at 48-49, 53) petitioners for not putting in their own contrary evidence before the district court. Predictably, such dueling expert affidavits would have led to discovery, depositions, and a hearing – precisely what is happening now in district courts in the Second Circuit – all before the court could even resolve whether to enforce the arbitration agreement. Such routine, costly, and time-consuming litigation will impede the effectiveness of all arbitration agreements.[4]

2. Respondents contend that this interference is necessary because, without an "effective vindication" exception to FAA § 2, arbitration agreements will become tools for defendants to obtain *de facto* immunity from federal statutory liability. But, as this Court held in *Vimar Seguros* and *CompuCredit*, although arbitral procedures may affect a party's practical ability to pursue its claim, the claimant's *substantive* rights remain intact as long as the

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[4] Respondents do not even address what would happen if they convince a judge that class proceedings are necessary to vindicate their claims but class certification is later denied under Rule 23. Is the bilateral arbitration agreement then to be enforced after a year or more of expensive litigation?

"*guarantee of the legal power to impose liability*" is preserved. *CompuCredit*, 132 S. Ct. at 671; *see* Pet. Br. 24-27. Thus, bilateral arbitration under mutually agreed-upon rules cannot be equated with a waiver of federal *substantive* rights. That conclusion is particularly straightforward here, where respondents' assertion that they will be unable to pursue their antitrust claims in bilateral arbitration is unsupported by the record. *See infra* pp. 20-23. Moreover, respondents ignore the fact that state and federal officials are presumptively able to enforce the law. *See* Pet. Br. 6-7.

D. The Proceedings Below Do Not Support Respondents' Claim That They Cannot "Effectively Vindicate" Their Antitrust Claim in Arbitration

Respondents repeatedly claim that (1) they are not insisting on class procedures, and (2) petitioners conceded that the class-action waiver precludes respondents from effectively vindicating their claims. Both claims mischaracterize the record.

1. Notwithstanding their current claim (at 35) that they would "gladly" arbitrate bilaterally under more generous terms, respondents consistently argued below that class procedures were the *only* means of vindicating their claims. In fact, they expressly rejected cost-sharing and similar measures as alternatives to a class action.

As discussed further below, American Express agreed – in both the district court and the Second Circuit – that "nothing [in the arbitration agreement] prevents Plaintiffs from hiring one expert to be shared by all Plaintiffs so that costs such as review of documents could be shared by Plaintiffs in whatever cost-sharing arrangement they agree to among them-

selves." Defs.' Opp. to Mot. To Alter or Amend J. 3 n.1 (4/11/06); *accord* Defs.' C.A. Br. 26-27 (11/1/06). It was *respondents* that objected that pooling of expert resources would be "impractical[]" and therefore a "non-starter." Pls.' C.A. Reply Br. 13-14 (11/17/06). Respondents further argued to the Second Circuit that bilateral arbitration would be infeasible "[e]ven if all disbursements and fees were recoverable by a prevailing party in a one-on-one arbitration under the Clayton Act," because "no self-interested litigant can be expected to advance close to $1 million" for a chance merely to recoup its costs plus a small recovery. Pls.' C.A. Br. 26; *see also* C.A. App. 627-28 (arguing that cost-shifting is irrelevant to the inquiry because it still forces plaintiffs to lay out the costs upfront and does not compensate them for the risk of losing). Respondents' consistent position was that only the prospect of aggregate damages would make pursuing their claims sufficiently attractive. The record thus belies respondents' contention (at 38) that this case is "not at all" about class proceedings.

2. No matter how many times respondents repeat the assertion, it is not "uncontested" that respondents cannot vindicate their claims in bilateral arbitration. Not only, as noted, did petitioners contest the point below and offer suggestions about how respondents could vindicate their claims without class procedures, but the district court agreed with petitioners. App. 113a-114a.

Respondents' principal evidence to the contrary was Dr. French's brief declaration opining that a detailed market analysis by a high-priced economist would cost up to $1 million. JA88. Respondents' lawyer further opined that additional costs for document management and "well over 30 depositions"

would be more than $300,000. JA83-84. Respondents jump (at 46) to the conclusion that "it will cost *each* of these businesses" that amount to prove their claims in arbitration. (Emphasis added.) But that does not follow.

Arbitration's central purpose is to provide more streamlined procedures. *See* Pet. Br. 49-52. JAMS, for example, calls for discovery to be guided by "[t]he amount in controversy" and "[t]he complexity of the factual issues."[5] Arbitral rules also authorize particularly streamlined procedures for small claims.[6] Thus, it is unrealistic and improper to assume that arbitrators adjudicating a $5,000 antitrust claim would insist on a $1 million expert report or 30 depositions.

Claimants or arbitrators also could employ procedural tools to reduce costs. As noted, petitioners themselves proposed that multiple plaintiffs could, as they commonly do, pool resources or share a single expert. *See* U.S. Chamber et al. Br. 27-30.[7] Arbitra-

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[5] JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases, Ex. A (eff. Jan. 6, 2010), http://www.jamsadr.com/arbitration-discovery-protocols/.

[6] AAA, Commercial Arbitration Rules & Mediation Procedures 31 (eff. June 1, 2009), http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.

[7] In holding otherwise, the Second Circuit misinterpreted the agreements' confidentiality provision. App. 92a. That provision merely ensures that arbitration proceedings remain private rather than public. As petitioners conceded, it does not prohibit arbitrators from permitting claimants in related arbitrations to share a single expert or pool expert resources subject to appropriate protective orders. Petitioners' concession should have been taken as decisive on this point because, even on the Second Circuit's mistaken reading of the provision, a party can

tors also could facilitate sharing of expert fees – which respondents now admit (at 2) "would make bilateral arbitration feasible" – by appointing their own experts. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) (holding that 28 U.S.C. § 1920(6) allows fee-shifting for court-appointed as distinct from party experts); Fed. R. Evid. 706(c)(2).[8]

Dr. French offered *no* analysis of any of these possibilities. And his analysis presumes that a class could be certified in this case – which cannot properly be assumed given the requirements of Rule 23. *See* Pet. Br. 44 n.16. Respondents thus have offered mere speculation to support their "effective vindication" claim. *See Randolph*, 531 U.S. at 92 (mere "speculation" does not even shift the burden to defendant to introduce contrary evidence); *Booker*, 413 F.3d at 81 (claimant's "burden cannot be carried by 'mere speculation' about how an arbitrator 'might' interpret or apply the agreement").

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always waive a procedural protection in the arbitration agreement. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (arbitration "is simply a matter of contract between the parties"); *Employers Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 942 (7th Cir. 1999) (stating that parties can modify arbitration procedures).

[8] A recent amendment of petitioners' merchant agreement contains a provision that may allow merchants prevailing in bilateral arbitration to be reimbursed for certain reasonable costs and fees, including attorney and expert witness fees, as part of their recovery. Whether that amendment applies to respondents' claims and, if so, the scope of any cost-shifting allowed would be a question for the arbitrators in the first instance. *See infra* p. 23. Petitioners do not rely on this amendment in their challenge to the decision below.

In *Mitsubishi*, the Court noted: "There is no reason to assume at the outset of the dispute that . . . arbitration will not provide an adequate mechanism" to resolve antitrust disputes. 473 U.S. at 636. While rejecting an anticipatory challenge to arbitration on choice-of-law grounds, the Court made clear that "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638. Similarly, in *Vimar Seguros*, the Court held that choice of law "must be decided in the first instance by the arbitrator." 515 U.S. at 540. Here, too, it is up to the arbitrators to determine in the first instance what procedures will, consistent with the parties' agreement, provide for an efficient, cost-effective resolution of any given claim, whether state or federal. Respondents' anticipatory concerns about the adequacy of bilateral arbitration procedures do not constitute grounds to refuse to "permit[] the arbitration to go forward." *Mitsubishi*, 473 U.S. at 638.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 15, 2013

AMICUS CURIAE BRIEF

No. 12-133

In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL., PETITIONERS

v.

ITALIAN COLORS RESTAURANT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a court should enforce an arbitration agreement under the Federal Arbitration Act, 9 U.S.C. 2, when the plaintiff demonstrates that its non-recoverable costs of arbitration will greatly exceed its potential recovery on a federal statutory claim.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether an arbitration agreement must be enforced under the Federal Arbitration Act, 9 U.S.C. 2, even when enforcement of the agreement will effectively foreclose the plaintiffs from asserting their claims under the Sherman Act, 15 U.S.C. 1 *et seq.* Private actions are an important supplement to the government's civil enforcement efforts under federal competition laws, which the Department of Justice and the Federal Trade Commission have primary responsibility for administering. Private actions are also an important component of many other federal statutory schemes. The United States therefore has a substantial interest in ensuring that arbitration agreements are not used to prevent private parties from ob-

taining redress for violations of their federal statutory rights.

STATEMENT

1. In 1925, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to "place[] arbitration agreements on equal footing with all other contracts" and to "overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); see *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2776 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."). The FAA applies to "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. 2. Such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Ibid.*

2. a. Respondents, merchants who accept American Express cards, are the named plaintiffs in this consolidated set of putative class actions. See J.A. 51-80; see also Pet. App. 63a, 100a n.1 (detailing the separate cases and procedural posture). As relevant here, respondents allege that petitioners—American Express Company and a wholly owned subsidiary—violated Section 1 of the Sherman Act, 15 U.S.C. 1, by engaging in an unlawful tying arrangement. Specifically, respondents allege that petitioners used their market power in corporate and personal charge cards to compel respondents to accept petitioners' mass-market credit and debit cards at elevated merchant-fee rates. J.A. 72-76; see generally *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 461-462 (1992).

The contractual relationship between petitioners and respondents is governed by the Card Acceptance Agreement (Agreement), petitioners' standard form contract for merchants. The Agreement contains a mandatory arbitration clause that requires all disputes between the parties to be resolved by arbitration. Pet. App. 7a. The Agreement further provides that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis," and that "Claims * * * may not be joined or consolidated" with claims brought by other merchants. *Id.* at 9a. The Agreement does not permit the prevailing party to shift its costs to the other party, and it contains a confidentiality provision that prohibits the disclosure of information obtained in an arbitration proceeding. *Id.* at 92a; Resp. Br. 49-50.

b. The class action complaints were consolidated in the Southern District of New York. Petitioners moved to compel arbitration under the Agreement's mandatory arbitration clause. See Pet. App. 7a-9a.

The district court granted petitioners' motion. Pet. App. 100a-124a. The court held that the parties' dispute fell within the scope of the Agreement's arbitration clause, *id.* at 110a, and it rejected respondents' argument that the clause should not be enforced because "the costs of individual arbitration would eclipse the value of any potential recovery," *id.* at 112a. The court stated that the treble damages provision of the Clayton Act, 15 U.S.C. 12 *et seq.*, provided "sufficient financial incentive to pursue [respondents'] claims." Pet. App. 113a. Accordingly, the district court granted petitioners' motion to compel arbitration and dismissed the suits. *Id.* at 123a.

3. The court of appeals reversed and remanded. Pet. App. 57a-99a.

a. The court of appeals held that the enforceability of the arbitration clause should be analyzed in light of this Court's statement in *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000), that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92; see Pet. App. 85a-86a. The court held that respondents had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver." *Id.* at 86a. Respondents had submitted a declaration from an economist (Dr. Gary L. French), who estimated that the cost of the expert analysis and testimony necessary to prove respondents' antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum damages any plaintiff could expect was $12,850, or $38,549 when trebled. *Id.* at 86a-89a; J.A. 93. The court emphasized that petitioners did not dispute this evidence. Pet. App. 86a n.17, 93a. The court accordingly concluded that "the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant [petitioners] de facto immunity from antitrust liability by removing [respondents'] only reasonably feasible means of recovery." *Id.* at 95a.

b. Petitioners filed a petition for a writ of certiorari (No. 08-1473). While that petition was pending, this Court issued its decision in *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). In *Stolt-Nielsen*, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. The

Court then granted the petition in No. 08-1473, vacated the court of appeals' judgment, and remanded for further consideration in light of *Stolt-Nielsen*. See 130 S. Ct. 2401 (2010).

On remand, the court of appeals again reversed the district court's decision and remanded for further proceedings. Pet. App. 31a-56a. The court concluded that *Stolt-Nielsen* did not cast doubt on its earlier reasoning because *Stolt-Nielsen* held only that "parties cannot be forced to engage in a class arbitration" absent an agreement to do so. *Id.* at 42a. "It does not follow," the court of appeals stated, that a "clause barring class arbitration is per se enforceable" even when it "effectively strip[s] plaintiffs of their ability to prosecute" alleged federal statutory violations. *Ibid.* The court of appeals stayed its mandate pending petitioners' filing a petition for a writ of certiorari. Pet. Br. 13.

c. While the mandate was stayed, this Court decided *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). The Court in *Concepcion* held that the FAA preempted a California state-law rule barring enforcement of most class-arbitration waivers in consumer contracts. *Id.* at 1748.

The court of appeals *sua sponte* reconsidered its ruling in light of *Concepcion* and again reversed and remanded. Pet. App. 1a-30a. The court concluded that, although *Concepcion* "offers a path for analyzing whether a state contract law is preempted by the FAA," *id.* at 16a, it did not abrogate *Randolph*'s holding that an arbitration agreement should not be enforced when it effectively forecloses the plaintiff from asserting federal statutory rights. See *id.* at 15a, 18a, 25a. The court of appeals explained that Dr. French's declaration established, and petitioners did not dispute, that the costs of

proving respondents' claim would far exceed the maximum possible individual recovery. *Id.* at 25a-29a. The court concluded that respondents could pursue their claims "as [a] judicial class action or not at all," and it accordingly remanded "with the instruction to deny [petitioners'] motion to compel arbitration." *Id.* at 29a-30a.

d. The court of appeals denied rehearing en banc, with five judges dissenting. Pet. App. 127a-149a.

SUMMARY OF ARGUMENT

I. Under this Court's precedents, federal statutory claims are generally arbitrable if, but only if, the applicable arbitration procedures offer plaintiffs a realistic opportunity to vindicate their federal rights.

A. The FAA establishes a generally applicable federal policy favoring the creation and enforcement of agreements to arbitrate. Although this Court at one time discountenanced agreements to arbitrate federal statutory claims, its more recent decisions have held the FAA to be fully applicable to such agreements. The Court has repeatedly cautioned, however, that such an agreement will not be enforced if its practical effect in a particular case would be to prevent the effective vindication of federal rights. The effective-vindication rule harmonizes the FAA with the various rights-conferring federal statutes under which private claims are brought. The rule allows contracting parties to agree that their disputes will be resolved by an alternative adjudicator (an arbitrator rather than a court), while denying enforcement in circumstances where an arbitration agreement functions in practical effect as a prospective waiver of substantive rights.

Petitioners suggest that the Court's various articulations of the effective-vindication rule amount to no more

than stray dicta. But the Court's affirmative rationale for enforcing agreements to arbitrate federal statutory claims—*i.e.*, that the effect of enforcement is simply to substitute one adjudicator for another, rather than to extinguish the plaintiff's cause of action—is inapposite when enforcement will as a practical matter prevent any adjudication at all. And, contrary to petitioners' contention, there is no logical basis for confining the effective-vindication rule to cases in which costs specific to arbitration render resort to the arbitral forum infeasible.

B. A plaintiff who seeks to avoid enforcement of its own agreement to arbitrate bears the burden of establishing the effective-vindication exception. Here, respondents carried that burden by submitting an expert declaration—which the court of appeals found convincing—establishing that the costs of expert assistance would greatly exceed the amount any named plaintiff could hope to recover in bilateral arbitration. Petitioners did nothing to rebut that evidence. Petitioners also have identified no viable means by which respondents' costs could have been shared or shifted so as to render arbitration under the procedures specified in the Agreement a practical and effective means of seeking redress.

The effective-vindication rule creates salutary incentives for the crafting of arbitration procedures that can realistically be used to pursue federal claims. Under this Court's existing FAA jurisprudence, companies that prefer arbitration to litigation have a strong incentive to craft workable, "plaintiff-friendly" arbitration procedures in order to obviate potential objections to enforcement of their agreements. Such provisions facilitate plaintiffs' ability to pursue their federal claims and increase the likelihood that actual arbitration will occur,

thereby furthering the purposes of both the substantive federal statute and the FAA.

C. Petitioners' reliance on *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), is misplaced. In contrast to this case, the Court in *Concepcion* emphasized that the streamlined arbitration procedures applicable to the parties' dispute did *not* foreclose the plaintiffs' ability to seek redress. And because *Concepcion* involved the arbitrability of state-law claims, the Court had no occasion to apply the effective-vindication rule or otherwise address the proper way of reconciling the FAA with *federal* rights-conferring statutes.

II. Petitioners' approach would impede not only the assertion of federal antitrust claims, but the vindication of numerous other federal statutory rights as well. Rather than encourage the adoption of arbitration procedures that can feasibly be used even for small-value cases, petitioners' approach would legitimize the use of arbitration agreements to extract what are in substance prospective waivers of substantive federal rights. That approach would subvert the purposes of the relevant rights-conferring statutes, without furthering the FAA's purpose of encouraging actual arbitration.

ARGUMENT

I. PETITIONERS' ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE THE PRACTICAL EFFECT OF ENFORCEMENT WOULD BE TO FORECLOSE RESPONDENTS FROM EFFECTIVELY VINDICATING THEIR SHERMAN ACT CLAIMS IN ANY FORUM

Agreements to arbitrate federal statutory claims are enforceable if, but only if, "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." See, *e.g.*, *Mitsubishi Motors Corp.* v.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).[1] The "effective-vindication" rule reconciles the FAA's policy of promoting arbitration with the policies of myriad federal statutes that confer substantive rights and authorize private suits by aggrieved persons. In this case, it is undisputed that the cost of proving respondents' Sherman Act claims far exceeds the recovery that any individual respondent can obtain, and the Agreement forbids all means of sharing or shifting those costs. Respondents therefore have demonstrated that the effective-vindication rule bars enforcement of the arbitration clause under the circumstances presented here.

For almost 30 years, the effective-vindication doctrine has provided a necessary incentive for contracting parties to craft arbitration procedures that afford realistic avenues for redress of federal statutory violations. Absent that constraint, parties would be free to craft agreements whose practical effect is to confer prospective immunity from liability under a wide range of federal statutes—including the antitrust laws, antidiscrimination and employment statutes, and consumer-protection laws. Such a result would undermine the remedial and deterrent effect of numerous federal statutes, without furthering the pro-arbitration policies of the FAA.

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[1] Different questions would be presented if a contractual arbitration clause precluded the plaintiff from seeking a form of relief (*e.g.*, punitive damages or attorneys' fees) that would be available under the relevant federal law if the plaintiff prevailed in court. A provision of that sort could be set aside as an invalid prospective waiver of substantive federal rights even if the plaintiff could obtain *some* relief through arbitration. See, *e.g.*, *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994), cert. denied, 516 U.S. 907 (1995). No such issue is presented here.

A. This Court's Decisions Upholding The Arbitrability Of Federal Claims Rest On The Premise That The Plaintiffs Could Effectively Vindicate Their Federal Claims Under The Arbitration Agreement

1. a. By providing that an agreement to arbitrate a dispute arising out of a contract or transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," under which "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25.

The policy in favor of arbitration applies to both federal- and state-law claims. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). During the initial decades after the FAA's enactment, however, the Court was reluctant to enforce arbitration agreements when the plaintiff asserted a federal statutory right. See *Wilko* v. *Swan*, 346 U.S. 427 (1953), overruled, *Rodriguez de Quijas* v. *Shearson Am. Express, Inc.*, 490 U.S. 477 (1989). In *Wilko*, the Court characterized the question before it as one of reconciling two federal statutes—the FAA and the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the statute the plaintiff sought to enforce. See 346 U.S. at 434-435, 438. The Court observed that the Securities Act forbade advance waivers of the Act's "provision[s]," *id.* at 434, and it found that "the right to select the judicial forum is the kind of 'provision' that cannot be waived," *id.* at 435.

The Court concluded that "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act." *Id.* at 438.

In *Mitsubishi*, *supra*, the Court changed course and held that claims under the Sherman Act are subject to arbitration. The *Mitsubishi* Court explained that the balance it had previously struck in reconciling the FAA with federal statutes conferring privately enforceable rights had been colored by an inappropriate hostility toward arbitration. 473 U.S. at 626-628; see *Rodriguez de Quijas, Inc.*, 490 U.S. at 480-481. The Court concluded that there was no inherent conflict between the Sherman Act's conferral of a private right of action to challenge anticompetitive conduct and the "congressional policy manifested in the [FAA]" because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 627-628; see *id.* at 636 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) (declining to apply *Wilko* because "the streamlined procedures of arbitration" do not inherently "entail any consequential restriction on substantive rights").

The Court in *Mitsubishi* identified two circumstances in which an arbitration agreement will not be enforced because the practical effect of enforcement would be to prevent the vindication of substantive federal rights. First, the Court stated that an agreement's specification of a particular arbitral forum will be set aside if "pro-

ceedings 'in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court.'" 473 U.S. at 632 (brackets omitted) (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). Second, the arbitration clause at issue in *Mitsubishi* provided for arbitration before a specified Japanese body, and the parties' contract specified that Swiss law would govern the agreement. *Id.* at 637 n.19. An amicus in *Mitsubishi* raised the possibility that the arbitrator might decline to apply the Sherman Act in resolving the parties' dispute. *Ibid.* The Court found that concern premature, since the arbitration panel had not yet ruled. *Ibid.* The Court observed, however, that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Ibid.*

The general rule that federal statutory claims are arbitrable is therefore subject to an important caveat, known as the effective-vindication rule: an arbitration agreement will not be enforced if, in a particular case, enforcement would prevent the effective vindication of the plaintiff's federal statutory rights. "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704 (1945) (holding that prospective waiver of rights under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, was invalid). When enforcement of an arbitration agreement would foreclose the plaintiff from

seeking redress for particular federal statutory violations, the arbitration agreement operates in practical effect as a prospective waiver of the party's substantive federal rights, rather than simply as an agreement to submit a dispute to an arbitral rather than a judicial forum.

b. Since *Mitsubishi*, this Court has repeatedly reaffirmed the effective-vindication principle. In *Gilmer*, *supra*, the Court held that the parties' arbitration agreement could permissibly be applied to claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Court explained that it did "not perceive any inherent inconsistency between" the ADEA and the FAA, *Gilmer*, 500 U.S. at 27, because "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," *id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637). In *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995), the Court enforced an arbitration agreement as it applied to claims under the Carriage of Goods By Sea Act, ch. 229, 49 Stat. 1207 (46 U.S.C. 30701 note). The Court observed, however, that the district court would "have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." *Ibid.* (quoting *Mitsubishi*, 473 U.S. at 638). As in *Mitsubishi*, the Court observed that the arbitration agreement would be invalid as applied if its "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Ibid.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19). Most recently, in *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273-274

(2009), the Court stated that an arbitration agreement that amounts to "a substantive waiver of federally protected civil rights will not be upheld."

In *Randolph*, *supra*, the Court applied the effective-vindication rule to a plaintiff's contention that arbitration costs would preclude her from asserting claims under the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* Plaintiff Randolph argued that enforcement of her agreement to arbitrate her TILA claims would "force[] her to forgo" those claims because the arbitration agreement's silence concerning costs and fees "create[d] a 'risk' that she [would] be required to bear prohibitive arbitration costs." *Randolph*, 531 U.S. at 90. After reiterating the effective-vindication rule, the Court stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Ibid.* The Court explained, however, that Randolph, as the "party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," bore the burden of "showing the likelihood of incurring such costs." *Id.* at 92. The Court concluded that she had not carried that burden, as she had made no "showing at all" concerning the costs that she would incur in arbitration. *Ibid.*

In sum, this Court's decisions establish that agreements to arbitrate federal statutory claims will not be enforced if enforcement would as a practical matter prevent the effective vindication of those claims. The Court's decisions also make clear, however, that a plaintiff who invokes the effective-vindication rule bears the burden of establishing the infeasibility of obtaining relief through arbitration, and that "mere speculation"

about how the arbitration might proceed is insufficient to satisfy that burden. *Booker* v. *Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.).

c. The effective-vindication rule is an application of the general principle that federal statutes must be reconciled to the extent possible. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The FAA generally requires that arbitration agreements be enforced as written. 9 U.S.C. 2. That command must yield, however, to the extent that enforcing the agreement would subvert the "remedial and deterrent function" of another federal statute. *Mitsubishi*, 473 U.S. at 637; *Gilmer*, 500 U.S. at 27-28. In that situation, the Court will "condemn[] the agreement as against public policy" and decline to enforce it. *Mitsubishi*, 473 U.S. at 637 n.19; cf. *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 267-268 (2007) finding implicit preclusion of the antitrust laws where antitrust liability would conflict with securities laws).

The effective-vindication rule is thus one—but not the only—instance in which the FAA's rule of enforcing arbitration agreements yields to a countervailing concern. The Court has also recognized that, when "Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum," the arbitration agreement need not be enforced. *Mitsubishi*, 473 U.S. at 628; *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227. Where Congress's intent to foreclose such waivers is "deducible from [the] text or legislative history" of a particular federal statute, that intent supersedes the more general policy judgment reflected in the FAA. *Mitsubishi*, 473 U.S. at 628. In addition, the FAA itself contemplates that arbitration agreements may sometimes be unenforceable "upon such grounds as exist at

law or in equity for the revocation of any contract." 9 U.S.C. 2. That provision "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citation and internal quotation marks omitted).

Respondents contend that individual arbitration pursuant to the procedures specified in the Agreement is not a feasible means of vindicating their Sherman Act rights because each plaintiff's non-recoverable arbitration costs will greatly exceed its potential recovery. As applied to these circumstances, the effective-vindication rule is a particularly suitable means of reconciling the pertinent federal statutes because it furthers the purposes of the Sherman Act *without* undermining any congressional policy judgment reflected in the FAA. The purpose of the FAA's "policy favoring arbitration," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25, is to enable parties to develop streamlined procedures "tailored to the type of dispute" that is likely to arise out of the parties' relationship, *Concepcion*, 131 S. Ct. at 1749. When a plaintiff could assert its claim in arbitration but would prefer a judicial forum, enforcement of the parties' agreement will "promote arbitration" in accordance with the contractually specified procedures. *Ibid.*; see 9 U.S.C. 2. But when an arbitration agreement effectively forecloses the plaintiff from seeking redress for particular federal statutory violations, enforcing the agreement will not result in actual arbitration pursuant to the contractually specified procedures. Instead, it will force the

plaintiff to abandon its claim entirely. That result serves no policy underlying the FAA.

2. Petitioners contend that this Court's articulations of the effective-vindication rule are (a) dicta and (b) limited to circumstances in which enforcement of an arbitration agreement would require the plaintiff to shoulder costs that it would not bear in litigation. Petitioners are incorrect.

Although petitioners characterize the effective-vindication rule as dicta (Br. 40-43), the Court in *Randolph* applied the effective-vindication framework to Randolph's claim. 531 U.S. at 90-92. The Court first stated the requirements for invoking the doctrine in Randolph's case and in future cases: "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. The Court then held that Randolph was unable to satisfy that burden. *Ibid.* But the fact that Randolph did not prevail does not render the Court's analysis dicta. Indeed, the Court suggested that the question of "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence" could be determined in future cases. *Ibid.*

Randolph did no more than apply an effective-vindication principle that has consistently been a necessary part of the Court's affirmative rationale for holding that agreements to arbitrate federal statutory claims are ordinarily enforceable. The Court has explained that, in the usual case, enforcement of such agreements will not trench unduly on the policies reflected in the relevant substantive federal law *because* the effect of enforcement is simply to substitute one adjudicator for

another, rather than to extinguish the plaintiff's federal cause of action. See *Mitsubishi*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). That rationale does not apply in circumstances where the likely practical effect of enforcing the parties' agreement is to prevent the plaintiff from obtaining *any* adjudication of the merits of its federal claim. See, *e.g.*, *id.* at 637 *("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,* the statute will continue to serve both its remedial and deterrent function.") (emphasis added); *Gilmer*, 500 U.S. at 28 (quoting same language in *Mitsubishi*).

Petitioners also argue (Br. 41-42) that the effective-vindication rule is limited to situations in which costs unique to arbitration—*i.e.*, fees that "would not be required to sue in court," *id.* at 41—render the procedure prohibitively expensive. But although the allegedly prohibitive expenses at issue in *Randolph* arose from arbitration-specific fees, the Court did not suggest that the arbitration-specific nature of the costs was relevant to its reasoning. 531 U.S. at 90-92. Nor is there any evident logical basis for drawing the distinction petitioners advocate. Arbitration necessarily entails some costs (most notably the arbitrator's fee) that the parties would not bear in litigation; those costs must be paid by someone; and there is (as a general matter) nothing suspect or unfair about a contractual provision that imposes some or all of those costs on the plaintiff who initiates arbitration. The rationale for declining to enforce such an agreement when arbitration-specific costs prevent effective vindication of a plaintiff's federal claim is that

the policies reflected in the FAA must be reconciled with those that underlie the relevant substantive federal statute. That rationale applies equally where, as here, the infeasibility of vindicating a plaintiff's federal claims through arbitration results from some factor other than arbitration-specific costs. See pp. 22-26, *infra*.

The Court in *Mitsubishi* stated that, if the arbitral panel designated by the parties' agreement ultimately declined to apply the Sherman Act to the plaintiffs' claims, the Court "would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19. Petitioners seek to distinguish that statement as "addressing prospective waivers of federal *substantive* rights, not procedural rules such as class procedures." Pet. Br. 48. Petitioners are correct that the effective-vindication doctrine is concerned at bottom with substantive rather than procedural rights. The Court has largely renounced the view, reflected in *Wilko* (see p. 10-11, *supra*), that a federal statutory provision authorizing aggrieved parties to file suit in court creates the sort of right that cannot be waived through an agreement to arbitrate. See *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 670-671 (2012). As the Court recognized in *Randolph*, however, rules governing the procedures under which arbitration will be conducted can sometimes have the same practical effect as an express waiver of substantive rights. 531 U.S. at 91-92. *Mitsubishi* and *Randolph* are properly viewed, not as identifying two isolated (and idiosyncratic) circumstances under which arbitration agreements will be held unenforceable, but as illustrating a common principle: an agreement to arbitrate federal statutory claims will not be enforced if, under the circumstances of a particular

case, the practical effect of enforcement would be to prevent effective vindication of a federal statutory right.

B. Respondents Have Established That The Arbitration Agreement At Issue Here Operates As An Impermissible Prospective Waiver By Foreclosing Them From Asserting Their Current Antitrust Claims

A court should "invalidate an arbitration agreement" if the plaintiff demonstrates that the agreement operates as an impermissible prospective waiver of federal statutory rights by making it "prohibitively expensive" to assert such claims in arbitration. *Randolph*, 531 U.S. at 92; see *Mitsubishi*, 473 U.S. at 637 & n.19. Respondents have satisfied that burden. It is undisputed that the costs of marshaling the evidence necessary to prove respondents' antitrust claims will far exceed the best-case recovery that any individual respondent could obtain. And the arbitration agreement precludes all means of sharing those costs—through a class action, joinder, or informal methods—or shifting them to petitioners.

1. Agreements prospectively waiving antitrust claims are invalid

The Court's reliance on the effective-vindication doctrine as a safety valve in cases involving a variety of federal statutes reflects a general presumption that prospective waivers of federal statutory rights are invalid. See pp. 12-13, *supra*; *Randolph*, 531 U.S. at 90-92 (TILA); *Gilmer*, 500 U.S. at 27-28 (ADEA); *Mitsubishi*, 473 U.S. at 637 n.19 (Sherman Act). Although Congress may authorize such waivers with respect to particular federal statutes, petitioners do not contend that any such authorization applies to respondents' Sherman Act claims, and it is well-established that parties may not prospectively waive the protections of the antitrust laws.

This Court recognized in *Mitsubishi* that a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" should be "condemn[ed] * * * as against public policy." 473 U.S. at 637 n.19. The *Mitsubishi* Court relied on a long line of authority, including *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955). There, the Court held that treating a previous antitrust suit dismissed pursuant to a settlement agreement as a res judicata bar to a subsequent suit based on post-settlement conduct would in effect confer "a partial immunity from civil liability for future violations," which would not be "consistent with * * * the antitrust laws." *Id.* at 329. The courts of appeals have repeatedly reaffirmed that agreements that operate as prospective waivers of antitrust liability will not be enforced. See, *e.g.*, *Redel's Inc.* v. *General Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) ("The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy."); see also *Sanjuan* v. *American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1995), cert. denied, 516 U.S. 1159 (1996); *Three Rivers Motors Co.* v. *Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975); *Gaines* v. *Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres* v. *Means*, 221 F.2d 173, 180 (8th Cir. 1955).

These decisions reflect the importance of private enforcement as a means of achieving the policy objectives of the antitrust statutes. Congress created the treble-damages remedy to encourage private suits alleging antitrust violations because such suits "provide a significant supplement to the limited resources available" for government enforcement. *Reiter* v. *Sonotone Corp.*, 442

U.S. 330, 344 (1979). If prospective waiver agreements were permissible, firms with substantial bargaining power could extract waivers from consumers, distributors, retailers, franchisees, and any other parties with inferior bargaining power. See 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 226 (3d ed. 2007). That result would vitiate the effectiveness of the private remedy, making it less likely that anticompetitive conduct will be detected and deterred.[2]

2. The arbitration agreement at issue here operates as a prospective waiver of respondents' antitrust claims

The arbitration agreement at issue in this case effectively precludes respondents from asserting their antitrust claims by making it prohibitively expensive for them to do so. *Randolph*, 531 U.S. at 92. It is uncontested that proving respondents' tying claim will cost far more than any individual respondent could recover if it prevailed, yet the Agreement prohibits any means of sharing or shifting those costs.

a. Respondents, who bore the burden of demonstrating that they "will bear" prohibitive costs in arbitration, *Randolph*, 531 U.S. at 90, presented expert evidence demonstrating that the cost of proving their tying claim would far exceed the recovery that any individual re-

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[2] Petitioners suggest (Br. 22-24) that, because Congress declined to create a class-action-like mechanism when it enacted the Sherman Act in 1890, the effective-vindication rule should not apply to antitrust claims. That argument lacks merit. Respondents are not challenging the lack of class arbitration procedures as such. Rather, they assert that the agreement's lack of *any* cost-sharing or cost-shifting mechanisms leaves them unable to vindicate their claims. See pp. 24-25, *infra*. Such agreements undercut the antitrust statutes' deterrent effect and should be "condemn[ed] as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19.

spondent could receive. To prevail on their claim, respondents must present expert evidence concerning, *inter alia*, petitioners' market power in the tying product market, anticompetitive effects in the market for the tied product, and the amount of damages suffered as a result of the arrangement. J.A. 88; see generally *Illinois Tool Works* v. *Independent Ink, Inc.*, 547 U.S. 28, 46 (2006). Respondents presented evidence that the expert analysis and testimony needed to establish these elements would entail expert fees and expenses of "at least several hundred thousand dollars," and possibly more than $1 million. J.A. 91. The estimated recovery for the respondent with the largest volume of American Express transactions, however, amounted to only "$12,850, or $38,549 when trebled." J.A. 92.

Petitioners have not contested respondents' estimates of either the costs of the necessary expert evidence or the damages an individual respondent might hope to recover. Pet App. 27a; Pet. Br. 49-50. Instead, they suggest (Pet. Br. 50) that a "costly economics expert report" might not be needed in an arbitration proceeding. But while arbitration entails procedures that are streamlined compared to litigation, those procedures do not relieve plaintiffs of the burden of proving their case.

Complex expert analyses are generally necessary to establish elements such as market power and damages. Petitioners have identified no reason to believe that arbitrators selected pursuant to the parties' agreement would effectively lower respondents' burden of proof by not "insist[ing] on the same complexity that federal courts would require." Pet. Br. 50; see, *e.g.*, *ZF Meritor, LLC* v. *Eaton Corp.*, 696 F.3d 254, 299 (3d Cir. 2012) ("Expert testimony is necessary to establish damages in

an antitrust case."). Nor have petitioners offered to obviate the need for the usual modes of proof by stipulating to some or all of the propositions that the expert report would otherwise be used to establish. And, given the extreme disparity between the projected non-recoverable costs of arbitration and the anticipated best-case recovery for any particular respondent, arbitration under the Agreement could be a feasible means of recovery only if respondents' calculations (which the court of appeals found to be essentially undisputed) were wildly wrong.

b. Because the costs of proving respondents' claims will greatly exceed the potential recovery for any individual respondent, some mechanism for sharing or shifting costs would be necessary to permit respondents to effectively vindicate their claims in arbitration. But the Agreement forecloses all such methods, leaving respondents with no practical means of establishing petitioners' alleged Sherman Act violations.

One way to enable respondents to assert their claims would be to permit cost-sharing through a collective action, such as a class action or joinder of multiple claimants in one arbitration proceeding. The Agreement prohibits both types of procedures, however, foreclosing respondents from spreading the costs of marshaling evidence among multiple plaintiffs. Pet. App. 8a-9a (agreement prohibits "representative" actions and provides that no claim may be "joined or consolidated" with claims brought by other parties). And while petitioners suggest (Br. 51) that individual respondents in separate arbitration proceedings could "hire the same expert witness, even outside the context of class proceedings," the Agreement's confidentiality provision effectively blocks that method of informal cost-sharing.

The Agreement provides that "all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Pet. App. 92a. Petitioners have not offered to waive that restriction, nor have they addressed the court of appeals' conclusion (see *ibid.*) that it precludes the introduction in multiple arbitration proceedings of a common expert report.

Even without a class-action or joinder procedure, respondents might be able to assert their claims if the Agreement permitted expert costs to be shifted petitioners. It does not. Resp. Br. 49-50. To be sure, there is nothing intrinsically unfair about an agreement that requires each party to bear its own costs in arbitration. Inclusion of such a cost-shifting provision, however, might have rendered individualized arbitration an economically feasible means of pursuing respondents' federal claim. That obvious alternative belies petitioners' contention (*e.g.*, Br. 27) that the decision below compels class proceedings in any case where an individual plaintiff's expected arbitral costs exceed its projected maximum recovery.

c. Respondents have therefore established that, as a result of restrictions contained in the arbitration agreement, each respondent, proceeding individually, may seek redress for petitioners' alleged antitrust violations only by incurring expenses far greater than the maximum recovery an individual business could hope to obtain. No rational actor would attempt to bring a claim when a negative recovery is a certainty. Under the circumstances of this case, an order compelling arbitra-

tion therefore would preclude respondents from effectively vindicating their federal claims.[3]

3. Reaffirming the effective-vindication doctrine in the circumstances presented here would not raise administrability concerns

Reaffirming the effective-vindication doctrine in the narrow circumstances presented here will not lead to a widespread refusal to enforce arbitration agreements, nor will it lead to the unworkable inquiries petitioners envision. Pet. Br. 32-33.

In the decade since *Randolph*, the courts of appeals have applied the effective-vindication framework very sparingly. Courts have rarely declined to enforce an arbitration agreement on the ground that it prevents sharing or shifting costs that would exceed the plaintiff's individual recovery. Compare *Kristian* v. *Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (holding that plaintiffs could not effectively vindicate antitrust claims where it was undisputed that costs of expert evidence would exceed recovery), with *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (rejecting effective-vindication challenge to arbitration agreement

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[3] Different questions would be raised if the plaintiff's projected best-case recovery was greater than its anticipated costs of arbitration, but the likely costs of a defeat substantially exceeded the potential net gain from a victory. Cf. Pet. App. 27a (explaining that, even when attorneys' fees are potentially recoverable, the plaintiff must consider the possibility of losing in evaluating the potential costs of suit). When the disparity between risks and rewards is so great as to render arbitration an economically unreasonable endeavor, enforcement of the arbitration clause will likely have the same practical effect as a prospective waiver of substantive rights. Applying the effective-vindication doctrine to that situation, however, would raise line-drawing concerns—such as the standard under which to evaluate the plaintiff's incentives—that are not implicated here.

because plaintiffs presented no evidence on costs of individual arbitration proceedings or "how those increased costs would affect their ability to proceed in arbitration"). Courts have also rarely found that costs specific to arbitration prevented plaintiffs from arbitrating their claims. Compare, *e.g.*, *Spinetti* v. *Service Corp. Int'l*, 324 F.3d 212, 216-220 (3d Cir. 2003) (affirming order compelling arbitration after severing costs provision on the ground that plaintiffs had demonstrated that they could not afford to pay costs of arbitration), with *EEOC* v. *Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 566-567 (8th Cir. 2007) (finding *Randolph*'s standard not satisfied because employer agreed to waive agreement's cost-splitting provisions and pay arbitrator's fee on employee's behalf); *Anders* v. *Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028-1029 (11th Cir. 2003) (similar); *Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (plaintiff failed to satisfy her burden of demonstrating prohibitive expense); *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557 (4th Cir. 2001) (same). There is no evident reason to suppose that the courts of appeals will abandon their prior reticence if this Court holds that an arbitration agreement is unenforceable in the circumstances presented here.

Applying the effective-vindication rule when a plaintiff demonstrates that the costs of asserting its claim under the arbitration agreement's procedures would be prohibitive also will not enmesh courts in complex and unworkable inquiries. That analysis involves a comparison between the likely costs of proving the plaintiff's claim under the arbitration procedures specified in the parties' agreement, and the potential recovery if the plaintiff prevails. Both variables are susceptible to

predictive calculation, with the aid of expert testimony if necessary. And because the burden is on plaintiffs to establish the infeasibility of arbitration, *Randolph*, 531 U.S. at 92, arbitration agreements will be enforced where the evidence on that question is uncertain. See, *e.g.*, *In re Cotton Yarn*, 505 F.3d at 285 ("mere speculation" about cost of asserting claim is insufficient).

The effective-vindication principle, it should be emphasized, is not simply a sound rule of decision for the rare case in which a federal statutory claim cannot feasibly be pursued through the arbitration procedure specified in the parties' agreement. In addition, the effective-vindication rule creates a salutary incentive for companies that prefer arbitration to ensure that such cases *remain* rare, by adopting arbitration procedures that can feasibly be invoked even for small-value claims. See, *e.g.*, *Carter* v. *Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004) (effective-vindication challenge was mooted by Countrywide's modification of arbitration agreement to provide that Countrywide would pay arbitration costs plaintiffs challenged as prohibitive). Under the effective-vindication rule, companies can determine what mechanism of preserving plaintiffs' ability to seek redress for federal violations best suits their priorities. That flexibility furthers the policies of the FAA by enabling companies to design procedures "tailored to the type of dispute" and to the company's needs. *Concepcion*, 131 S. Ct. at 1749.

Indeed, in response to concerns about consumers' ability to bring low-value claims under arbitration agreements containing class-action waivers, many companies have modified their agreements to include streamlined procedures and premiums designed to encourage consumers to bring claims. See Ramona L.

Lampley, *Is Arbitration Under Attack?*, 18 Cornell J.L. & Pub. Pol'y 477, 513-514 (2009) (discussing evolution of "third-generation" arbitration agreements designed to encourage individual meritorious low-value claims). The agreement at issue in *Concepcion* is an example. There, AT&T Mobility modified its arbitration agreement during the course of the litigation to include cost- and fee-shifting provisions and premiums designed to ensure that consumers could bring low-value claims on an individual basis. 131 S. Ct. at 1744. Those modifications left consumers "*better off* under their arbitration agreement" than they would have been in class litigation. *Id.* at 1753. And by obviating a potential objection to enforcement of the arbitration agreement, those modifications simultaneously served the company's interest in avoiding litigation.

Under petitioners' approach, by contrast, the incentives would run in the opposite direction. Companies would have every reason to employ procedural restrictions like those at issue here to foreclose plaintiffs from asserting in *any* forum federal claims for which costs exceed the likely individual recovery. That use of arbitration agreements would nullify the deterrent and compensatory effect of the very federal statutes—such as the Sherman Act—that Congress enacted to regulate the relationship between the contracting parties. And, far from furthering the purposes of the FAA, a rule encouraging the use of such agreements would disserve those purposes by reducing the likelihood that actual arbitration will occur.

C. Applying The Effective-Vindication Doctrine In This Case Is Consistent With This Court's Decision In *Concepcion*

Petitioners' primary argument (Pet. Br. 27-40) is that the Court abrogated the effective-vindication rule in *Concepcion*, leaving companies free to draft arbitration provisions that prevent counterparties from asserting their federal claims in any forum. Petitioners are incorrect.

1. a. The plaintiffs in *Concepcion* were consumers who wished to assert low-value (approximately $30) state-law fraud claims against AT&T Mobility. 131 S. Ct. at 1744. They argued that the class-action waiver contained in their arbitration agreement was invalid under a state-law doctrine known as the "*Discover Bank* rule." *Id.* at 1746. That rule, which California courts had "frequently applied * * * to find arbitration agreements unconscionable," treated class-action waivers as unenforceable when they were contained in adhesion contracts that would give rise to predictably small individual claims, and the plaintiffs alleged that the defendant had engaged in a scheme to cheat consumers out of small sums. *Ibid.* The rationale behind the rule was that class proceedings were a more effective means of deterring conduct harmful to consumers than individual actions asserting small-value claims. See *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1108-1109 (Cal. 2005).

This Court held that the *Discover Bank* rule was preempted because it stood as "an obstacle to the accomplishment of the FAA's objective[]" of ensuring that arbitration agreements are enforced according to their terms. *Concepcion*, 131 S. Ct. at 1748. The Court explained that the *Discover Bank* rule "interfere[d] with

arbitration" because it would apply to virtually any consumer arbitration contract without regard to the contract's terms—since most such contracts are adhesion contracts involving small claims—and it would permit any party to such a contract to demand class arbitration "*ex post*." *Id.* at 1750.

b. The Court in *Concepcion* did not address, much less repudiate, the effective-vindication rule. The *Discover Bank* rule was not limited to situations in which enforcement of an arbitration agreement would leave the plaintiff entirely unable to bring her claims. Rather, the rule rendered class-arbitration waivers unenforceable in virtually every consumer adhesion contract, regardless of whether the plaintiff could feasibly vindicate her claim through individual arbitration. The rule was thus designed to preserve the "deterrent effects of class actions," *Concepcion*, 131 S. Ct. at 1745, rather than to protect a diligent plaintiff's ability to assert her own individual claim.

In the penultimate paragraph of its opinion, the Court in *Concepcion* addressed, and rejected, the dissenting Justices' conclusion "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753. But the *reasons* the Court gave for rejecting the dissenters' analysis are inapplicable to the present case. The bulk of the relevant paragraph in the Court's opinion explained that "the claim here was most unlikely to go unresolved" because the streamlined arbitration procedures adopted by AT&T Mobility largely ensured that plaintiffs would be able to assert, and obtain full redress for, even the very low-value claims at issue. *Ibid.* Here, by contrast, the premise of the court of appeals' decision was that respondents' rights could *not*

feasibly be vindicated through individual arbitration proceedings.

The Court in *Concepcion* also observed that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. By its terms, however, that is an observation about the power of "States." It suggests at most that, under the Supremacy Clause, the FAA might have superseded the *Discover Bank* rule even if the arbitration agreement had effectively precluded the plaintiffs from asserting their fraud claims in any forum. The recognition that the FAA displaces any conflicting state-law rule says nothing about the enforceability of an arbitration agreement that would preclude the vindication of a substantive *federal* right. In that context, the effective-vindication rule governs the reconciliation of the two federal statutes. *Randolph*, not *Concepcion*, controls that analysis. See pp. 14-15, *supra*.

2. Petitioners also contend (Br. 27-34) that applying the effective-vindication rule here would contravene *Concepcion* by "conditioning the enforceability" of an arbitration agreement on "the availability of classwide arbitration procedures." *Id.* at 28 (quoting *Concepcion*, 131 S. Ct. at 1744). The problem with the Agreement here, however, is not that it requires individual arbitration, but that it prevents respondents from vindicating their current federal claims at all. Accordingly, the court of appeals did not hold that respondents were entitled to assert their claims in a class arbitration proceeding. Cf. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-1776 (2010) (holding that courts may not order class arbitration when the agreement does not expressly provide for it). Instead, the court simply held that the arbitration clause should not

be enforced as applied to respondents' Sherman Act claims. Pet. App. 30a.

II. THE EFFECTIVE-VINDICATION PRINCIPLE ENSURES THAT ARBITRATION PERMITS PRIVATE ENFORCEMENT OF NUMEROUS FEDERAL STATUTES

The effective-vindication rule has long served to ensure that, "[b]y agreeing to arbitrate a [federal] statutory claim, a party does not forgo the substantive rights afforded by the statute." *Mitsubishi*, 473 U.S. at 628. That rule prevents arbitration clauses from being used as a mechanism through which consumers, employees, and businesses are induced to waive their rights to assert federal claims against their counterparties. Private actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other federal statutes. Those include consumer-protection statutes such as the Servicemembers Civil Relief Act, 50 U.S.C. App. 501 *et seq.*; antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.*; and labor and employment statutes such as the FLSA, and the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*

Claims under many of these statutes may predictably generate only small damages awards for any particular plaintiff. Yet these statutes confer important protections from practices that are broadly harmful even if they do not result in large monetary damages to particular affected individuals. These statutes also reflect a congressional judgment that private enforcement, even of small-value claims, is an important component of the statutory scheme. By holding that an arbitration agreement will not be enforced if enforcement would

prevent a particular plaintiff from seeking redress for its federal claims, the effective-vindication rule encourages companies drafting arbitration agreements to ensure that even small-value federal claims can be effectively pursued through arbitration. The use of such streamlined procedures furthers the policies that underlie both the FAA and the various federal statutes that confer rights of private enforcement. See pp. 28-29, *supra*.

Under petitioners' approach, by contrast, companies could use a combination of class-action and joinder prohibitions, confidentiality requirements, and other procedural restrictions to increase the likelihood that a plaintiff's cost of arbitration will exceed its projected recovery. Companies could then require assent to such unwieldy procedures as a condition of doing business, accepting employment, or purchasing products. That would deprive a range of federal statutes of their intended deterrent and compensatory effect, see *Brooklyn Savings Bank*, 324 U.S. at 710, without promoting the actual use of arbitration as an alternative means of dispute resolution. The FAA is intended to ensure that arbitration is not disfavored as a means of vindicating claims, including federal statutory claims. It is not intended to prevent federal claims from being brought in any forum.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2013

AMICUS CURIAE BRIEF

No. 12-133

In The Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org.[1] The goals of U.S. competition policy could be seriously undermined if Congress' interest in promoting the speedy and efficient resolution of claims through arbitration is not properly balanced against Congress' interest in promoting private enforcement of the antitrust laws. When arbitration provisions fail to provide for the effective vindication of Sherman Act rights, they fail to serve the congressional policies underlying either statute, and disserve both.

---

[1] The parties have lodged blanket consents to the filing of *amicus* briefs with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* has made a monetary contribution to its preparation or submission.

The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. A majority of AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

INTRODUCTION AND SUMMARY OF ARGUMENT

In granting certiorari in this case, the Court posed the following question: "Whether the Federal Arbitration Act ("FAA") permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim." *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom.*, American Express Co. v. Italian Colors Restaurant, 81 U.S.L.W. 3070 (U.S. Nov. 9, 2012). In two recent decisions, this Court has plainly held that a party may not be compelled to submit to class arbitration unless it has agreed to do so. *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). These decisions were based at least in part on the conclusion that "arbitration is ill-suited to the higher stakes of class litigation." *Concepcion*, 131 S. Ct. at 1752.

In light of this Court's holdings in *Concepcion* and *Stolt-Neilsen*, and particularly in light of the Second Circuit's disposition of the case below, *see In re American Express Merchants Litig.*, 667 F.3d 204, 219 (2d Cir. 2012) ("*Amex III*") (holding that *Stolt-Nielsen* precludes court from compelling the parties to submit to class-wide arbitration), the proper question before this Court is not whether an arbitration agreement can be invalidated on the grounds that it does not permit *class-wide arbitration*, but rather, whether an arbitration agreement

can be invalidated where plaintiffs irrefutably demonstrate that bilateral arbitration will effectively preclude their ability to vindicate their federal antitrust claims. Put another way, the question before this Court is whether congressional policy favoring private enforcement of the antitrust laws must yield to a competing federal policy favoring arbitration. The Second Circuit struck the appropriate balance between these two competing federal policies when it concluded that "[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes." *Amex III*, 667 F.3d at 218.

The Sherman Act's enforcement scheme, and particularly its treble damages remedy, manifests a congressional policy favoring private enforcement of the federal antitrust laws. This Court has specifically recognized that "private enforcement is an integral part of the congressional plan for protecting competition" and "plays a central role in enforcing this regime." *See California v. American Stores Co.*, 495 U.S. 271, 284 (1990); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). Indeed, this Court has repeatedly referred to the private litigant's role in antitrust enforcement as that of a "private attorney-general" who protects the public's interest. *Id.*

Just as private actions are integral to the enforcement of the antitrust laws, class actions are integral to the private enforcement scheme. This Court has repeatedly emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (recognizing that private suits, including class actions, "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Without class actions, cartelists and other antitrust violators would have little to fear, as individual treble damages actions by direct purchasers are extremely rare. *See infra* Part I.B.

While recognizing the pivotal importance of private enforcement of the antitrust laws, this Court held in *Mitsubishi Motors* that congressional policy did not preclude arbitration of federal antitrust claims. 473 U.S. at 640. This ruling however, was explicitly premised on the understanding that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. As this Court explained, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. The underlying principle behind *Mitsubishi Motors* (and later cases discussing this principle) is that arbitration is intended to operate as

a transfer of forum, rather than a suppression of statutory rights.

The purpose of the FAA is to foster efficient and speedy adjudication of claims, not to suppress the vindication of statutory rights. *See Concepcion*, 131 S. Ct. at 1749 (identifying a goal of the FAA as the "encouragement of efficient and speedy dispute *resolution*") (emphasis added). On the record before the Court (a record that Amex did not seriously challenge), Plaintiffs demonstrated that their claims could not reasonably be pursued on an individual basis, whether in federal court or in arbitration. *Amex III*, 667 F.3 at 218. Thus, the application of the FAA to require bilateral arbitration in this case would have *the opposite effect* as that intended by the FAA; *precluding* rather than *promoting* speedy and efficient dispute resolution. Neither the goals of the FAA, nor the goals of the Sherman Act are forwarded by a rule of law that requires litigants to press antitrust claims in a forum in which no rational person would pursue the claim.

Petitioners' readings of this Court's decisions in *Mitsubishi Motors* and *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000), are overly narrow and illogical. There is no practical difference between burdening the exercise of a statutory right because the costs to proceed in arbitration are too high, and burdening the exercise of a statutory right because the costs of proceeding on an individual basis are too high. It is the fact that the rights

are burdened, not the manner in which they are burdened, that is important.

In any event, neither *Mitsubishi Motors* nor *Randolph* purported to provide a litany of factual situations where effective vindication was unlikely or impossible. Instead, this Court decided both cases on the facts presented, holding that the plaintiffs there had failed to make the requisite factual showing that effective vindication of their statutory claim was not possible in an arbitral forum. Here, by contrast, Plaintiffs have made the requisite showing – unrebutted by Petitioners – that their claims cannot reasonably be pursued as individual actions.

The Second Circuit's decision is not foreclosed by *Concepcion*. *Concepcion* was decided on preemption grounds. *See, e.g.*, 131 S. Ct. at 1753 ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is *preempted* by the FAA.") (emphasis added). The preemption analysis employed in *Concepcion* is simply inapplicable where two federal statues are in apparent conflict. Unlike *Concepcion*, this case presents the question of whether and under what circumstances *federal* policy in favor of private enforcement of the antitrust laws must yield to (supposedly) contrary federal policy in favor of arbitration. Where, as here, even the goals of the FAA are not served by requiring arbitration, this Court should reach a different conclusion than it reached in *Concepcion*.

Having no real answer to Plaintiffs' demonstration that their claims cannot be pursued on an individual basis, both Petitioners and their *amici* extol the virtues of bilateral arbitration and impugn the ethics and efficacy of class actions. Even ignoring the unrebutted fact that *Plaintiffs' claims* would never be pressed in bilateral arbitration proceedings, Petitioners and their *amici* do not and cannot cite authority supporting the proposition that arbitration of *complex* claims requiring intensive economic and expert analysis would be resolved more efficiently and cheaply in arbitration than they would in court. In fact, complex claims such as the antitrust claims now before the Court are not well suited for resolution in arbitration. *See infra* Part III.

Certainly class actions are not perfect, and in recent years, Congress has taken action to cure perceived abuses in the class action mechanism. But the fact remains that in a large swath of antitrust cases – for example, those challenging cartel behavior resulting in overcharges to direct purchasers – class actions are the predominant (and perhaps only practical) means of deterring violations and recovering overcharges to injured purchasers. The Court should not adopt a rule of law that could foreclose access to a key enforcement mechanism under the federal antitrust laws.

The decision of the court below appropriately balanced federal policy favoring arbitration and federal policy favoring the enforcement of the antitrust laws. As Plaintiffs demonstrated, requiring

bilateral arbitration of their claims would not result in "efficient and speedy dispute *resolution*," but rather would result in *no resolution* of these claims at all. The court below correctly concluded that Plaintiffs had demonstrated, as required by this Court's precedent, that arbitration was not an adequate and accessible substitute forum in which to resolve their federal antitrust claims. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE SHERMAN ACT'S ENFORCEMENT SCHEME AND ITS TREBLE DAMAGES REMEDY MANIFEST A CONGRESSIONAL POLICY FAVORING PRIVATE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS.

A. The Antitrust Laws Were Carefully Crafted to Encourage and Foster Private Enforcement Actions.

Congress enacted the Sherman Act in 1890 as the first of several antitrust laws aimed at protecting consumers from perceived abuses in the marketplace. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The Act gave responsibility for enforcing the laws to both the Department of Justice and private parties. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2004)). To ensure the latter had sufficient incentives to detect

and file actions against antitrust violators, the Act included a treble damages remedy and allowed recovery of attorney's fees and costs for successful plaintiffs. *Id.* (codified as amended at 15 U.S.C. § 15 (2000)); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, n.10 (1977) (recounting the history of the Sherman Act and observing that treble damages were conceived primarily as a remedy for "'the people of the United States as individuals.'" (quoting 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George)). The provision of treble damages to successful private parties clearly evinces a congressional intention to promote private enforcement of the antitrust laws. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); *see also Perma Life Mufflers Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

This Court has specifically recognized that private enforcement is "an integral part of the congressional plan for protecting competition." *See California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing *Mitsubishi Motors*, 473 U.S. at 635, which notes, "[w]ithout doubt, the private cause of action plays a central role in enforcing this regime"); *Illinois*

Brick Co. v. Illinois, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). Indeed, it has repeatedly referred to the private litigant's role in antitrust as that of a "private attorney general." *See, e.g., Mitsubishi Motors*, 473 U.S. at 635 ("The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.") (internal quotation omitted); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (Clayton Act "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *see also Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 542 (1983) (describing private antitrust plaintiffs as "perform[ing] the office of a private attorney general").

The late William Baxter, who served as Assistant Attorney General in the Reagan Administration, suggested that the executive branch has even come to rely on private enforcement because this "common-law approach to antitrust law adopted by Congress requires that the executive branch have discretion to select the particular cases it prosecutes . . . [; to] the extent that suits by private plaintiffs produce an efficient development of antitrust law, it becomes less critical for the executive branch to ensure that the courts have appropriate cases and arguments before

them." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 678, 682 (1982). Moreover, private party lawsuits do not require a large expenditure of government resources, thereby shifting "the expense of enforcement away from the governmental agencies." *See* Joseph P. Bauer, *Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Anti-trust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 310 (2004).

In many instances, private enforcement is the only available means to redress an antitrust violation. Government enforcement is "inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations." Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent. L. Rev. 207, 211 (2003). Government objectives also shift over time, resulting in uneven enforcement of certain antitrust provisions. *Id.* at 230 ("[E]nforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair. For ideological reasons, budgetary constraints, and staff workloads, cases may never be brought that would have been a front-burner issue at another time."). Private enforcement ensures that all types of antitrust violations will be pursued and the enforcement system will remain stable, regardless of the political leadership in power at the time. *See* Spencer

Weber Waller, *The Future of Private Rights of Action in Antitrust*, 16 Loy. Consumer L. Rev. 295, 299 (2004) ("[v]igorous private enforcement has lent the system a certain stability in the United States in comparison to other more centralized systems of competition law"). As Professors Lande and Davis explain:

> As a practical matter, the government cannot be expected to do all or even most of the necessary enforcement for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.

Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases, 42 U.S.F.L. Rev. 879, 906 (2008).

Perhaps for these reasons, private actions have now become the *dominant means* by which antitrust violations are remedied and deterred.[2] In the late 1970's, when the Court decided *Reiter v. Sonotone*

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[2] Today, private enforcement accounts for 90-95 percent of all antitrust actions. *See* Bauer, *supra*, at 308, n.22 (collecting data).

Corp., 442 U.S. 330 (1979), "nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice." *Id.* at 343. Today, the number of private antitrust cases brought in federal court exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1. *See* American Antitrust Institute, *The Next Antitrust Agenda* 222 (Albert A. Foer ed. 2008). A 2008 study analyzing 40 of some of the largest successful private antitrust cases since 1990 found that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 891, 897 (2008).[3] Another six of the 40 cases, which netted recoveries of $4.2 billion, had a "mixed" public/private origin, and in another nine of the 40 cases, a private enforcement action yielded relief significantly broader in scope than relief obtained in the government enforcement action. *See id.* at 897-98, 909-10. Sometimes, it is the government that "piggybacks" on private actions. *See, e.g., In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 n.31 (E.D.N.Y. 2003) (explaining that the Department of Justice filed a

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[3] The study does not purport to be a comprehensive account of all antitrust settlements or actions during the period. *See* Lande & Davis at 889. Research for the study was funded by the AAI. *See id.* at 879.

lawsuit based in part on information provided by class counsel); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 226 (D.D.C. 2005) (noting that class action counsel uncovered the illegal activity of vitamin manufacturers across the globe and shared the information with the Department of Justice "enabling the criminal investigation to begin"). Notably, the $4.2 billion in total criminal fines obtained by the government for all prosecutions during the Lande and Davis study period was less than one quarter of the total in private recoveries during the same period from just the 40 private cases studied. *See* Lande & Davis at 893-94.

In short, private actions are a key, in fact *the key* component in the congressional plan to promote enforcement of the antitrust laws. A decision that private rights of action must give way under all circumstances to a federal policy favoring arbitration, as urged by Petitioners here, must be rejected.

B. Class Actions Are Integral to the Private Enforcement Scheme.

This Court has repeatedly emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves

this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Class actions are responsible for much of the antitrust laws' deterrence value. *See Reiter*, 442 U.S. at 344 (recognizing that class actions "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Without class actions, certain antitrust violations would not be pursued because of the small amount an individual plaintiff may expect to recover. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

Not only has this Court recognized the importance of class actions, but Congress has too. In the Class Action Fairness Act, Congress found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action." Class Action Fairness Act of 2005, 28 U.S.C. § 1711, Pub. L. No. 109-2, Sec. 2, Feb. 18, 2005, 119 Stat. 4, Findings and Purposes (a)(1). The Senate Report accompanying the Act stated that "[c]lass actions were designed to provide a mechanism

by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries. As such, class actions are a valuable tool in our jurisprudential system." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 4, 5. To effectuate Congress' enforcement scheme, private lawsuits and class actions must both remain viable.

It is widely recognized that class actions play a particularly important role in ensuring that the private damages remedy serves its intended function of deterring antitrust violations and compensating victims. As the bipartisan Antitrust Modernization Commission concluded, "The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs." Antitrust Modernization Commission, *Report and Recommendations* 241 (2007).

Cartels, which are the subject of universal and worldwide condemnation, would have little to fear without class actions because individual treble-damages actions by customers are not common. *Compare* II Phillip Areeda & Herbert Hovenkamp, Antitrust ¶ 311 (3d ed. 2007 and Supp. 2012) (noting the "relative simplicity of class action treatment of

simple price-fixing cases and the strong policy, now held worldwide, of condemning naked price fixing"). For example, in the Lande and Davis study, only six of the 40 successful cases did not involve class actions. *See* Lande & Davis, *supra*, at 901. Private antitrust actions are extremely expensive to pursue because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006). Attorney's fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g., In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 401, 409-10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue).

Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative-value cases, *i.e.*, cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:33, at 290 (4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Petitioners argue that Congress' rejection of a proposal to include a class action mechanism when deliberating the Sherman Act in 1890 reflects a congressional judgment that small dollar claims may

be left to be vindicated through other enforcement mechanisms – such as competitor lawsuits and government enforcement actions. Petitioners' Br. at 24. Neither law nor logic supports this argument. Competitors lack standing to pursue damages for many Sherman Act violations, including claims arising out of hard core, naked price-fixing agreements. In such a case, damages may be recovered only by a direct purchaser, the very entity that might also be a party to an arbitration agreement.

Petitioners' argument likewise ignores numerous statements both by this Court and others that class actions provide a "significant supplement to the limited resources available to [government enforcement agencies] for enforcing the antitrust laws and deterring violations." *See Reiter*, 442 U.S. at 344. Weakening and perhaps even eliminating one of those enforcement mechanisms is inconsistent with the congressional scheme.

II. AN ARBITRATION AGREEMENT THAT REQUIRES BILATERAL ARBITRATION OF FEDERAL ANTITRUST CLAIMS IS UNENFORCEABLE WHERE PLAINTIFFS CAN ESTABLISH THAT ENFORCEMENT OF THE PROVISION EFFECTIVELY PRECLUDES VINDICATION OF THEIR FEDERAL STATUTORY RIGHTS.

Recognizing both the congressional policy favoring private enforcement of the antitrust laws and the importance of the class action mechanism to

Congress' private enforcement scheme, the Second Circuit concluded that the arbitration agreement between the parties below could not be enforced. *Amex III*, 667 F.3d at 218. Relying on Plaintiffs' unrebutted showing that the costs of the necessary expert analysis would far exceed the individual treble damage recovery for even the largest merchant Plaintiff, the court found that enforcing the arbitration agreement in the case before it would "flatly ensure[ ] that no small merchant may challenge [Defendants'] tying arrangements under the federal antitrust laws." *Id.* at 218. Concluding that "[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes," *id.*, the Second Circuit declined to enforce the arbitration agreement. *Id.* at 219. *Cf.* Areeda & Hovenkamp, *supra* at ¶ 311 (discussing *Stolt-Nielson*: "reading the arbitration agreement so as to preclude class action treatment may have been tantamount to making any price-fixing overcharge action effectively unavailable for a large portion of the customers at issues.").

The decision of the court below is consistent with established authority in this Court and properly balances federal policies behind the Sherman Act and the Federal Arbitration Act.

A. This Court Has Held that Arbitration Provisions Are Unenforceable Where they Preclude Plaintiffs from Effectively Vindicating their Federal Statutory Rights.

In a series of decisions from the mid-1980s through the early 1990s, this Court held that statutory claims, including federal statutory claims arising under the Sherman Act, were subject to arbitration.[4] The underlying philosophy of those decisions, as expressed in *Mitsubishi Motors* was that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. As this Court explained, "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("claims under [federal] statutes are appropriate for arbitration . . . '[s]o long as the prospective litigant effectively may vindicate [his

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[4] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding Sherman Act claims amenable to arbitration); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (RICO claims are subject to arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application).

or her] statutory cause of action in the arbitral forum,'" allowing the statute "'to serve both its remedial and deterrent function.'") (quoting *Mitsubishi Motors*, 473 U.S. at 637).

In *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000), this Court set out the framework for determining when an arbitration provision will be enforced. It restated and reaffirmed that an arbitration provision could only be enforced so long as the prospective litigant could effectively vindicate his or her statutory rights. *Randolph*, 531 U.S. at 90 (citing *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637)). Further, this Court recognized that there could be circumstances in which an arbitration agreement is unenforceable because it would not permit the vindication of a litigant's statutory rights. *Id.* at 90 ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."). However, because the plaintiff had not met her burden of establishing that she would actually bear high arbitration costs and because in fact the record "contain[ed] hardly any information" at all on the question of costs, this Court found the plaintiff's argument "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 90-91.

Subsequent to *Mitsubishi Motors* and *Randolph*, a number of Circuit Courts have recognized the requirement that the arbitral forum allow for the effective vindication of statutory rights. *See, e.g.*,

Kristian v. Comcast Corp., 446 F.3d 25, 54 (1st Cir. 2006) ("We have said that the legitimacy of the arbitral forum rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.'"); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) ("employers should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights."); *Inv. Partners, LP v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002) ("Investment Partners can vindicate its statutory rights in arbitration pursuant to the terms of its agreement."); *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626 (7th Cir. 2002) (recognizing this Court's holding, in *Gilmer*, that claims under federal statutes may be appropriate for arbitration as long as the litigant may effectively vindicate her statutory cause of action in the arbitral forum, and the statute will continue to serve its remedial and deterrent purposes), *reh'g granted and vacated*, 298 F.3d 677 (7th Cir. 2002); *Blair v. Scott Specialty Gates*, 283 F.3d 595, 607 (3d Cir. 2002) ("[T]he Supreme Court has also made clear that arbitration is only appropriate 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum' allowing the statute to serve its purposes.") (quoting *Mitsubishi Motors*, 473 U.S. at 637); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002) ("Courts have since interpreted Gilmer to require basic procedural and remedial protections

so that claimants can effectively pursue their statutory rights.").

Despite the above cited authority, Petitioners eschew the notion that the concept of effective vindication of statutory rights is part of the "federal substantive law of arbitrability." Brief for Petitioners ("Petitioners' Br.") at 29. As they characterize it, "'the federal substantive law of arbitrability' is simply the 'body of federal substantive law interpreting and effectuating FAA section 2. . . .'" *Id.* But case law developing the legal and factual principles under which an arbitration clause *will not be enforced* is just as much a part of the "substantive law interpreting and effectuating [the] FAA" as cases discussing the principles under which such agreements *will be enforced*. All such questions concern the "validity, revocability and enforceability of arbitration agreements." *See Robert Lawrence Co. v. Devonshire Fabric, Inc.*, 271 F.2d 402, 409 (2d Cir. 1959) ("the body of law created by the FAA is substantive not procedural in character and . . . it encompasses questions of interpretation and construction, as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce.").

The decision of the court below appropriately balanced federal policy favoring arbitration and federal policy favoring the enforcement of the antitrust laws. The national policy favoring the enforcement of arbitration agreements does not stand in a vacuum. Instead, the goal of the FAA is to encourage

"efficient and speedy dispute resolution." *Concepcion*, 131 S. Ct. at 1749. *See also* Brief *Amici Curiae* of Distinguished Law Professors in Support of Petitioners ("Professors in Sup. of Pet'rs. Br.") at 16 (identifying goal of FAA to "facilitate streamlined proceedings" and to promote "efficient alternative[s] to [the] judicial process."). But as plaintiffs demonstrated below, the enforcement of the arbitration agreement here does nothing to forward the goals of the FAA. There is little doubt that requiring bilateral arbitration of these claims would not result in "efficient and speedy dispute resolution," but rather, would result in no resolution of these claims at all. The court below correctly concluded that Plaintiffs had demonstrated, as required by this Court's precedents, that arbitration was not an adequate and accessible substitute forum in which to resolve their federal antitrust claims.

B. Petitioners' and Their *Amici's* Narrow Construction of the *Randolph* Case and the Effective Vindication Doctrine Are Irrational in Light of the Federal Policies Underlying Both the FAA and the Sherman Act.

Both Petitioners and their *amici* argue that *Randolph* and *Mitsubishi Motors* are narrow decisions that should be limited to the facts presented in those cases. Specifically, Petitioners argue that *Randolph*'s holding is limited to situations where costs unique to arbitration (such as filing and arbitrator's

fees) would be prohibitive. *See* Petitioners' Br. at 41; Professors in Sup. of Pet'rs. Br. at 7. Similarly, Petitioners contend that *Mitsubishi Motors* must be limited to its facts – concerning only arbitration provisions that override substantive federal law. Petitioners' Br. at 45. That narrow and technical reading of those cases makes no sense, especially in light of the articulated purpose of the "effective vindication" principle.

"Effective vindication" is designed to ensure that the federal statute involved "will continue to serve both its remedial and deterrent function." *See Mitsubishi Motors*, 473 U.S. at 637 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, *the statute will continue to serve both its remedial and deterrent function*.") (emphasis added). Thus, there is no practical difference between burdening the exercise of a statutory right because the costs to proceed in arbitration are too high, and burdening the exercise of a statutory right because the costs of proceeding on an individual basis are too high. It is the fact that the rights are burdened, not the manner in which they are burdened, that undermines a statute's "remedial and deterrent functions."

Moreover, neither *Randolph* nor *Mitsubishi Motors* purports to list a litany of situations in which the arbitral forum might burden the effective vindication of statutory rights. Instead, this Court decided both cases on the facts presented, holding that the plaintiffs there had failed to make the requisite

factual showing that effective vindication of their statutory claim was not possible in an arbitral forum. In stark contrast to the record in *Randolph*, there is nothing "speculative" about Plaintiffs' contention in the instant case that the high cost of establishing defendants' liability for antitrust violations in bilateral arbitration proceedings absolutely precludes them from vindicating their statutory rights. Plaintiffs' showing stands absolutely unrebutted, with Petitioners and their *amici* offering only suggestions and speculation to counter the proffered evidence.[5]

On the record before it, the Second Circuit's conclusion that no rational litigant or attorney would proceed with these claims, except as a class action, is reasonable. *See Kristian*, 446 F.3d at 54 ("The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). Plaintiffs demonstrated, as required by *Randolph*, that resort to an arbitral forum would

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[5] *See* Petitioners' Br. at 50-51, discussing the use of non-class procedural mechanisms (such as sharing attorneys and experts) to minimize costs. Petitioners made no showing below as to the feasibility of these proposals and on their face they are questionable. For example, even if pooling resources and sharing experts were feasible in light of the arbitration clauses at issue, *see* Respondents' Br. at 48-50, the expert would likely have to testify in each proceeding, a wasteful, expensive and inefficient process that would be avoided in class proceedings.

effectively preclude the vindication of their federal statutory rights under the Sherman Act.

C. The Decision Below Does Not Run Afoul of *Concepcion*.

The question presented in *Concepcion* was whether the *Discover Bank* rule recognized under California law (*see Discover Bank v. Sup. Court*, 36 Cal. 4th 148 (2005) (holding that class action waivers in most consumer adhesion contracts are unconscionable and therefore unenforceable) was in the nature of a "generally applicable contract defense," or whether the rule, as applied, specifically disfavors arbitration and thus must yield to contrary congressional intent as embodied in the FAA. *Concepcion*, 131 S. Ct. at 1750.

In concluding that the rule must yield to the FAA, this Court employed a preemption analysis, holding that because the rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [it] is *preempted by the FAA*." *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). *See also, id.* ("*[S]tates* cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.") (emphasis added); *id.* at 1748 ("[N]othing in [Section 2 of the FAA] suggests an intent to preserve *state-law rules* that stand as an obstacle to the accomplishment of the FAA's objectives.") (emphasis added). In short, the decision

stands for the proposition that *state laws* and *state public policy interests* must yield to conflicting federal policy embodied in the FAA.[6]

The preemption analysis this Court used in *Concepcion* is simply inapplicable when two competing *federal* policies are at issue. Indeed, despite the fact that this Court has repeatedly used the language of "effective vindication" when evaluating the enforceability of agreements to arbitrate federal claims, and despite the fact that numerous circuit courts of appeals (in addition to the Second Circuit) have also used this language, this Court did not ever mention effective vindication in *Concepcion*, nor discuss the effect of its decision on that long-standing federal doctrine.

Unlike the situation present in *Concepcion*, this case presents the question of whether and under what circumstances federal policy in favor of private enforcement of the antitrust laws must yield to (supposedly) contrary federal policy in favor of arbitration. Where, as here, even the goals of the FAA are not served by requiring arbitration, this Court should

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[6] In what must be characterized as *dicta*, this Court also noted that it was not convinced that the small dollar consumer claims at issue in *Concepcion* would not be brought in individual arbitrations. Instead it noted that given the particular claim and arbitration provision involved, it was "most unlikely" that the plaintiffs' claim would go unresolved in the absence of collective adjudication. *Id.* at 1753. Thus, the *Concepcion* plaintiffs did not make the factual showing made here that vindication of the claim was practically precluded in bilateral arbitration.

reach a different conclusion than it reached in *Concepcion*.

III. THE ARBITRATION FORUM IS ILL-SUITED TO THE LITIGATION OF COMPLEX ANTITRUST CLAIMS SUCH AS THOSE REQUIRING EXTENSIVE EXPERT ANALYSIS.

In support of their positions Petitioners and their *amici* extol the benefits of bilateral arbitration. Leaving aside for the moment the unrebutted fact that there *would be no arbitration* of the claims made here, the benefits of bilateral arbitration, at least with respect to antitrust claims in which detailed expert analysis is required, are highly overstated. Antitrust cases often involve intricate legal issues that even experienced judges may have difficulty deciding. These difficulties are compounded in arbitration because the resolution of legal issues will not be subject to judicial review. *See Concepcion*, 131 S. Ct. at 1752 (review of arbitrators' decisions "focuses on misconduct rather than mistake [and] [p]arties may not contractually expand the grounds or nature of judicial review"). As Judges Smith and Moye have noted:

> [T]he very attributes that make arbitration an attractive alternative to formal litigation for certain contractual relationships make it ill-suited for others. Many cases sent to arbitration often pose important legal questions. The resolution of these matters outside of the

> court system deprives the citizenry of an open, accessible development of the common law as it pertains to commercial, consumer and employment disputes.

Judge Craig Smith & Judge Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 Tex. Tech. L. Rev 281, 297 (2012) (footnotes omitted). Put another way, "[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions." *Id.* at 300. *See also Concepcion*, 131 S. Ct. at 1752 ("[T]he absence of multilayered review [in arbitration] makes it more likely that errors will go uncorrected.").

Both Petitioners and their *amici* refer to articles and studies that purport to demonstrate consumer satisfaction with the arbitration process. *See, e.g.*, Petitioners' Br. at 51-52; Brief of *Amici Curiae* American Bankers Association *et al.* in Support of Petitioners ("Am. Bankers Assoc. Br.") at 9-14. None of these materials, however, appear to relate to arbitrations of complex claims, such as antitrust actions, and many studies appear to be sponsored by parties with a financial interest in promoting arbitration. Other commentators, however, suggest grave problems with aspects of the alternative dispute resolution process. *See* Smith & Moye, *supra*, at 299 (discussing "arbitrator bias" and the inherent conflicts of interest created by the financial incentives in the arbitration industry).

Petitioners' *amici* also argue that individual arbitration is cheaper and more efficient than class actions or class arbitrations, and that businesses pass along these savings to consumers. *See, e.g.*, Am. Bankers Ass'n. Br. at 10. However, even if businesses would pass along their lower dispute-resolution costs to consumers, "the notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws." *See Ting v. AT&T*, 182 F. Supp. 2d 902, 931 n.16 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).

In short, there is little support for the proposition that arbitration of complex matters, such as claims that require intensive economic and expert analysis, would be resolved more efficiently and cheaply in arbitration than they would in court. In fact, for various reasons, including inter alia the lack of judicial review, the absence of res judicata, and the potential for duplicative proceedings, such claims are not well suited for resolution in arbitration.

IV. PETITIONERS' AND THEIR *AMICI'S* ATTACKS ON CLASS ACTIONS ARE IRRELEVANT AND UNFOUNDED.

Petitioners and their *amici* contend that the Second Circuit's decision reflects a "pro-class action policy" bias that fails to account for the serious drawbacks to the class action device. Petitioners' Br. at 19.

Among the points made by Petitioners and their *amici* are the following:

- Class Actions can be vehicles for collusive settlements that benefit the lawyers and not the class.[7]
- Class actions are unfair to defendants and "can distort the underlying substantive law by creating hydraulic pressure to settle even meritless claims."[8]
- The deterrent role that class actions play can be served by other means including government enforcement and other types of collective actions.[9]

As an initial matter, these arguments are irrelevant. Congress enacted Rule 23 to provide for the maintenance of class actions in appropriate circumstances. Fed. R. Civ. P. 23. To the extent that the class action mechanism has been abused (and no doubt there have been abuses), the appropriate course is to act, as Congress has, through amendments to Rule 23, such as the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711 *et seq*. Perceived problems with the

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[7] *See, e.g.*, Petitioners' Br. at 54; Am. Bankers Ass'n. Br. at 14-15.

[8] *See, e.g.*, Petitioners' Br. at 19; Brief for *Amicus Curiae* The Financial Services Roundtable in Support of Petitioners ("Fin. Serv. Br.") at 21.

[9] *See, e.g.*, Petitioners' Br. at 55; Brief of *Amicus Curiae* New England Legal Foundation in Support of Petitioners ("New Engl. Leg. Found. Br.") at 21-25.

class action device in general (or more pointedly with certain cases in particular) should not be addressed by putting the class action mechanism out of the reach of appropriate and meritorious cases.

In any event, while Petitioners and their *amici* refer to the problem of meritless class actions and complain about unfairness when certification of such actions creates "hydraulic pressure to settle" (Petitioners' Br. at 19), there is no reliable empirical evidence that settlements of meritless class actions are common. For example, when the Antitrust Modernization Commission recently studied whether the antitrust laws should be modernized and considered the claims of some critics that the range of available remedies under the antitrust laws resulted in excessive payments by defendants, it reported that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission. . . ." Antitrust Modernization Commission *Report*, *supra* at 247; *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 103 (2010) ("claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend"); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1395 n.164 (2003) ("[t]here is little empirical evidence supporting the theory that frivolous lawsuits are common").

Significantly, the suggestion that businesses routinely settle "meritless" class actions with substantial payments is a myth. "Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions." Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 159 (2006); *see id.* at 158 ("Class action practice in the real world is characterized by a very high incidence of successful motions to dismiss, successful motions for summary judgment, and unsuccessful motions for class certification."); *see also* Silver, *supra*, at 1393 ("Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. Rev. 65, 70 n.12 (1996) ("In real litigation . . . defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel . . . such that it seems unlikely a plaintiff can create a sufficient threat, based on disparity of litigation cost alone, to coerce a settlement.").

Similarly, the notion that class action lawyers are the primary beneficiaries of class actions also does not withstand scrutiny. For example, the Fitzpatrick study cited by the Center for Class Action Fairness shows that in 2006 and 2007, class action settlements in federal court recovered nearly $33 billion in monetary relief, of which roughly $5 billion, or about 15 percent,

was awarded to class action lawyers. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Leg. Stud. 811, 811 (2010); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Leg. Stud. 248, 262, 265 (2010) (comprehensive study of class action settlements showing that mean fee was 23 percent of class award, with lawyers receiving a smaller proportion as the size of the recovery increased, *e.g.*, a mean fee of 12 percent for recoveries exceeding $175.5 million). Lande and Davis reported that the 34 antitrust class actions in their study recovered a total of about $14-15 billion for businesses and consumers, before deducting attorney's fees. *See* Lande & Davis at 899, 901 (sum of direct and indirect purchasers' recoveries). And that did not include the monetary value of any injunctive relief, which in some instances dwarfed the compensatory relief. *See id.* at 891, 901-02; *e.g.*, *Visa Check/Mastermoney*, 297 F. Supp. 2d 503, 511-12 (E.D.N.Y. 2003) (noting "injunctive relief will result in future savings to the Class valued from approximately $25 to $87 billion or more," while compensatory relief was $3.38 billion). In the 30 cases where the information was available, attorney's fees (and expenses) constituted approximately 14.5 percent ($1.4 billion) of the cash recoveries in those cases ($9.7 billion). *See* Lande & Davis at 902-03 & n.95, 911-12 (noting that percentage of recovery declined as recovery increased).

There are surely occasional abuses by class action lawyers, just as there are sometimes abuses by defense lawyers. *See* Miller at 66 ("[T]he defense bar and its clients are not always innocent victims of frivolous litigation or abusive conduct; indeed defense attorneys [may] protract pretrial processes . . . to coerce contingent-fee lawyers . . . into settlement"). However, there is simply no basis for the claim that businesses routinely settle meritless class actions or that such settlements undercut the deterrent value of class actions generally.

Amicus curiae The Financial Services Roundtable, after cherry picking several settlements it describes as unfair or abusive, makes the incredible assertion that "it is easy to see why Congress has not precluded plaintiffs' efforts to take ownership over their rights in advance by committing to bilateral arbitration." Fin. Serv. Br. at 12. Of course, there is no support for the proposition that it is *plaintiffs* who "choose" to enter into bilateral arbitration agreements in order to enforce their rights. Nor is there anything in the court's decision below that would preclude plaintiffs from opting out of a class action and pursuing their claims in arbitration if they wished. To the contrary, it is the defendants who "choose" the arbitral forum for plaintiffs, effectively precluding plaintiffs from having any "choice" in the matter whatsoever. Moreover, it is equally clear that defendants choose arbitration not to promote the litigation of these small claims, but in fact to avoid litigating them at all. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740,

1761 (Breyer, J., dissenting) (noting that where small-dollar claims are concerned, "'[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits . . . '") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

Indeed, research supported by the AAI suggests three conclusions: (1) that class actions play a crucial role in private enforcement, enabling direct and indirect purchasers to recover at least $15 billion in damages over the previous two decades, *see* Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, ___ Seattle U. L. Rev. ___ (forthcoming 2013), *available at* http://ssrn.com/abstract=2132981, at pp. 18-19; (2) that private antitrust enforcement likely provides a more effective deterrent of antitrust violations than criminal enforcement by the Department of Justice, *see id.* at pp. 8-11; *see generally* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315 (2011); and (3) that sanctions from the combination of private and public antitrust enforcement create much too weak a deterrent of antitrust violations, at least when it comes to illegal cartels. *See generally* Robert H. Lande & John M. Connor, *Cartels As Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427 (2012). The implication is that antitrust

enforcement, including through class actions, should be strengthened, not undermined.

CONCLUSION

For the reasons hereinabove stated, and for those set forth in Respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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RECORD AND BRIEFS

No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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Amici Curiae American Bankers Association ("ABA"), American Financial Services Association ("AFSA") and Consumer Bankers Association ("CBA") (together, "*Amici*") respectfully submit this brief in support of Petitioners American Express Company and American Express Travel Related Services Company, Inc. (together, "AMEX"). All counsel of record received timely notice of *Amici's* intent to file this brief under Supreme Court Rule 37 and provided blanket consent to the filing in letters filed with this Court on November 19, 2012 and December 12, 2012.[1]

AMICI'S INTEREST IN THIS CASE

ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority—approximately 95%—of the domestic assets of the U.S. banking industry. ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer

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[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici* and their members made a monetary contribution intended to fund the preparation or submission of the brief.

finance companies. The association represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices.

CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Many of *Amici*'s members, constituent organizations and affiliates (collectively, "Members") have independently adopted as standard features of their consumer contracts provisions that call for individual arbitration of disputes arising from or relating to those contracts, upon the election of either party. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation. Members strive to ensure that their arbitration agreements provide a fair, efficient and cost-effective means for both Members and their customers to resolve disputes between them.

The core mandate of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, is to enforce private arbitration agreements according to their terms. Last year, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that consumer

arbitration agreements are fully enforceable even if they prohibit class-wide arbitration of claims that are too small individually to assert in court or in arbitration. Notwithstanding this decision, the Panel below ruled that AMEX's arbitration agreement with the merchants that accept AMEX charge and credit cards was unenforceable because, the Panel believed, the merchants did not have enough at stake to justify individual arbitration. This erroneous decision threatens to undercut *Concepcion* and to throw into doubt the enforceability of the arbitration agreements utilized by our Members. Accordingly, *Amici* have a compelling interest in the issues at stake in this case and in reversal of the Panel's decision.

SUMMARY OF ARGUMENT

The Panel decision below is fundamentally inconsistent with this Court's ruling in *Concepcion*, which held that the FAA precludes courts from refusing to enforce bilateral arbitration agreements based on the perceived policy advantages of class procedures. In addition, it fosters the distinct misimpression that individual arbitration is far less desirable than class action litigation as a procedure for resolving disputes. However, there is substantial empirical data establishing that individual arbitration benefits contracting parties, enables statutory rights to be vindicated even in small dollar cases and avoids the serious pitfalls associated with class actions. Moreover, individual arbitration does not exculpate defendants because governmental enforcement provides an effective remedy for alleged wrongdoing. Thus, the Panel's policy justifications for invalidating the parties' arbitration agreement are not only unavailing under *Concepcion*, but also wrong on their own terms.

ARGUMENT

The law recognizes a strong interest in the enforceability of contracts in accordance with their terms. *See Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 721 (8th Cir. 2003) ("Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract."). Prior to the adoption of the FAA, this public policy was circumvented with respect to arbitration agreements by state and federal courts alike, which refused to enforce such agreements. *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA, 9 U.S.C. § 2 ("Section 2"), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement is enforceable just as any other contract . . . ." *Vaden*, 556 U.S. at 64. In *Concepcion*, this Court applied this rule to an arbitration agreement that included a provision precluding class proceedings.

I. *Concepcion* Mandates A Ruling In Favor Of AMEX.

In *Concepcion*, this Court rejected the so-called "*Discover Bank*" rule, adopted by the California Supreme Court in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), and implemented by the Ninth Circuit in the lower court proceedings leading to the *Concepcion* decision. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Under the *Discover Bank* rule, an arbitration provision containing a class action waiver is conclusively deemed unconscionable and hence unenforceable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. The rule was designed to ensure that parties with superior negotiating power cannot use arbitration to exempt themselves from responsibility for their own fraud or willful injury to the person or property of another. *Id.*

This Court found the *Discover Bank* rule incompatible with the FAA because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 131 S. Ct. at 1751. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and

speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Id.* at 1751 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010)). By contrast, "[c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes." *Id.* at 1750. Among other things, "before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* at 1751. Therefore, this Court concluded, the FAA preempts the *Discover Bank* rule because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The logic of *Discover Bank*, as articulated by the California Supreme Court, is that a consumer in a small-claims case will never have enough at stake to merit initiating an individual arbitration proceeding. Likewise, the Panel below concluded—wrongly, we submit—that the high costs of an antitrust proceeding, even under streamlined arbitral procedures, would also deprive a potential plaintiff of the ability to vindicate its rights. Thus, *Discover Bank* and the instant case are flip sides of the same coin: In one scenario, rights supposedly cannot be vindicated because of the low amounts in controversy; in the other, the thought is that the rights cannot be vindicated due to the high costs of seeking recovery. Because the Panel below, like the California Supreme Court in *Discover Bank* and the Ninth Circuit in *Laster*, justified its refusal to enforce the arbitration agreement on its conclusion that

enforcement would preclude the plaintiffs from enforcing their rights, the Panel decision is wholly at odds with *Concepcion*'s reversal of *Laster* and rejection of *Discover Bank*.

The majority in *Concepcion* acknowledged the argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." Notwithstanding this rationale for the *Discover Bank* rule (and the Ninth Circuit decision in *Laster*), this Court instructed that "States cannot require a procedure that is inconsistent with the FAA . . . ." 131 S. Ct. at 1753. Thus, it held that "California's *Discover Bank* rule is preempted by the FAA." *Id.*

The Panel below claimed that *Concepcion* did not "address[] the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their *federal statutory rights*." *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) ("*Amex III*") (emphasis added). According to the Panel, "*Concepcion* plainly offers a path for analyzing whether a *state contract law* is preempted by the FAA. Here, however, our holding rests squarely on 'a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" *Id.* at 213 (emphasis added) (citing the vacated decision in *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) ("*AMEX I*")).

The Panel below never attempted to explain why the legal rights at issue in *Concepcion*, while founded on state contract principles, merited less protection under the "federal substantive law of arbitrability" than the federal statutory rights at issue in the

instant case. The time when this Court afforded disfavored FAA treatment to statutory causes of action is long past. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that Sherman Act claims are arbitrable under the FAA). And, certainly, nothing in the FAA suggests that the coverage of the FAA is broader for state-law causes of action than federal claims. The FAA establishes a federal substantive law of arbitrability that applies equally in state as well as federal courts. *Southland Corp.*, 465 U.S. at 12. To the extent that state law is inconsistent with the FAA, it is preempted by the FAA.

Moreover, the Panel did not assert that Congress, when it enacted and subsequently amended the Sherman and Clayton Acts (both before and after adoption of the FAA), manifested any intent in the special context of antitrust lawsuits to override the strong federal policy favoring the enforcement of arbitration agreements. Thus, while the plaintiffs in *Concepcion* asserted state law claims and the plaintiffs here are asserting federal antitrust claims, the distinction is legally irrelevant.

In fact, the "federal substantive law of arbitrability," as articulated in the explicit language of the FAA, recognizes a single exception to the enforcement of arbitration agreements as written: The sole grounds for invalidating an arbitration agreement are those that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Panel below never attempted to explain how its vindication of statutory rights analysis meets the statutory test requiring grounds "for the revocation of any contract." 9 U.S.C. § 2. Clearly, a rule that would enforce an arbitration agreement if the plain-

tiff asserts a state law claim but would invalidate the arbitration agreement if the plaintiff instead attempts to allege a federal antitrust violation does not provide a basis for the revocation even of the arbitration agreement, much less a basis for the "revocation of any contract."

II. Individual Arbitration Benefits Contracting Parties And The Public And Avoids Serious Pitfalls Associated With Class Actions.

A. The Benefits Of Individual Arbitration.

"The advantages of arbitration are many: It is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). These "advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). For example, the District Court in *Concepcion* concluded that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster v. T-Mobile USA, Inc.*, No. 05-cv-1167, 2008 U.S. Dist. LEXIS 103712, at *37 (S.D. Cal. Aug. 11, 2008).

The benefits of arbitration are not limited to parties who have disputes. Rather, *all* contracting parties benefit from the lower dispute resolution

costs inherent in arbitration. This is because economic considerations encourage companies to pass on to their customers, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91-93.

Moreover, published studies show significant additional benefits to arbitration, as well as high levels of satisfaction for parties who participate in arbitration. *See, e.g.*, Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation* (Apr. 2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (strong satisfaction with arbitration results and process, including speed and simplicity); RoperASW, *2003 Legal Dispute Study* (Apr. 2003) (survey, conducted by telephone of a random cross-section of 1,036 adult Americans, ages 18 and older, concluded that 64% of individuals would choose arbitration over court litigation and 67% believe court litigation takes too long); ABA Section of Litigation Task Force on ADR Effectiveness (August 2003) (survey of trial lawyers showed that seventy-eight percent of trial attorneys find arbitration faster than lawsuits and eighty-six percent of trial attorneys find arbitration costs are equal to or less than lawsuit costs); Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, ABA Section of Litigation, Conflict Management, Vol. 6, Issue 3 (Winter 2003) (individuals prevail at least slightly more often in arbitration than through lawsuits; monetary relief for individuals is slightly higher in arbitration than in lawsuits; arbitration is approximately 36% faster

than a lawsuit); Michael A. Perino, *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (2002) (ninety-three percent of consumers using arbitration find it to be fair; consumers prevail 20% more often in arbitration than in court); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004) (study examined the outcomes of 226 arbitrations in lending-related, consumer-initiated cases based on data from January 2000 to January 2004, and a telephone survey of a random sample of claimants, and observed that: (a) consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer; (b) consumers obtained favorable results (including settlements) in 79% of the cases that were reviewed; and (c) 69% of consumers surveyed were satisfied with the arbitration process); Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 14 Metropolitan Corp. Counsel 32 (2006) (study compared "win" rates and case durations from certain disclosed 2003-2004 consumer arbitration awards from California with publicly available outcome information from the Bureau of Judicial Statistics on litigated contract cases involving individuals in the 75 largest counties in the United States and concluded that (a) consumers who brought arbitration claims against businesses prevailed in 65.5% of cases, while plaintiffs litigating contract claims in court prevailed 61.5% of the time overall, and (b) the median duration for arbitrations was 4.35 months, compared with 19.4 months for court lawsuits); Lewis L. Maltby, *Private Justice:*

Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concluded that employees collectively receive 10.4% of their demand in litigation, compared with 18% in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

In 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA. *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. on Disp. Resol. 843 (2010). The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December 2007, reached the following conclusions: (1) The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses. (2) AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months). (3) Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). (4) No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business. (5) Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was

$14,574. (6) A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol. (7) AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol violations. (8) AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses. In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol. (9) As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.

A second study by the same organization, this one involving debt collection, showed that: "[C]onsumers prevailed more often in arbitration than in court . . . . [T]he likelihood of creditors winning in arbitration is less than in court." The authors further concluded that "nothing in our study provides any evidence of biased outcomes in arbitration." Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80, 83 (2011). *See also* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 Penn St. L. Rev. 1051 (2009) (study based upon an analysis of data derived from debt collection arbitrations commenced by creditors concluded that "the consumer arbitration process provides a more pro-consumer environment for claims adjudication than does the traditional court system").

The Panel decision fosters the distinct misimpression that individual arbitration (a) is far less desirable than class action litigation as a procedure for resolving disputes and (b) exculpates the corporate defendant. *See, e.g.*, 667 F.3d at 219 ("Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all."); *id.* (requiring individual arbitration would "immunize" AMEX against liability). In other words, according to the Panel, class action litigation is not only superior to individual arbitration, but it is the only viable procedure that protects consumers where class arbitration is not permitted. The above studies and empirical data and the experience of *Amici* members in individual arbitrations contradict the Panel's conclusions.

B. The Problems With Class Actions.

While significant benefits are provided by individual arbitration proceedings, the existence of substantial problems with class actions cannot be disputed. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice 2000) (leaving open the "great big question" whether class actions, on balance, serve the public well); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner, sponsor of Class Action Fairness Act)

("The class action judicial system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."). Certainly, reasonable consumers could well prefer cost savings and other arbitration benefits to the speculative prospect of "relatively paltry potential recoveries" in class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Even where statutory claims are litigated in court, most consumers choose to litigate on an individual, rather than a class action basis. According to the LexisNexis CourtLink® database, over the past decade, 93% to 98% of all TILA claims brought in the federal courts were brought as individual actions, rather than class actions, even though TILA expressly permits class actions to be brought:

Year	TILA Individual Actions	TILA Class Actions
2002	539 (94% of total)	37 (6% of total)
2003	474 (93% of total)	39 (7% of total)
2004	554 (97% of total)	20 (3% of total)
2005	473 (97% of total)	19 (3% of total)
2006	671 (98% of total)	17 (2% of total)
2007	665 (95% of total)	40 (5% of total)
2008	733 (94% of total)	51 (6% of total)
2009	1,320 (97% of total)	40 (3% of total)
2010	928 (98% of total)	17 (2% of total)
2011	539 (98% of total)	15 (2% of total)

C. AMEX's Compliance With Federal Antitrust Laws Is Subject To Government Enforcement Mechanisms.

Notwithstanding Congress' considered decision *not* to provide for class actions under the antitrust laws, the Panel below concluded that enforcement of the class action waiver "'would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery.'" *AMEX III*, 667 F.3d at 211 (quoting *AMEX I*, 554 F.3d at 320). Not only is that conclusion unjustified, but the threat and reality of government enforcement also provide a powerful brake on improper conduct and an effective remedy for any wrongdoing that does occur.[2]

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[2] Prior to *Concepcion*, a number of courts relied upon government enforcement mechanisms in upholding the validity of arbitration agreements with class action prohibitions. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 375-76 (3d Cir. 2000) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce the federal Truth in Lending Act); *accord, Gay v. CreditInform*, 511 F.3d 369, 381 (3d Cir. 2007); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001). *See also Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1292 (M.D. Ala. 2003) (sustaining class action waiver in arbitration agreement in view of administrative enforcement mechanisms for violations of the federal Equal Credit Opportunity Act and the federal policy favoring arbitration); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1137-1138 (D. Kan. 2003). Moreover, Congress has *eliminated* private actions entirely (not just class actions) under several consumer credit statutes, relying *entirely* upon the efficacy of robust administrative enforcement. *See, e.g.*, Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 2604(a), 110 Stat. 3009-470 (eliminating private actions under the Truth-in-Savings Act); *Perry v. First Nat'l Bank*, 459 F.3d 816 (7th Cir. 2006) (holding

The U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), among other agencies, play an aggressive role in enforcing the antitrust laws. Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, give the DOJ authority to obtain preliminary and permanent injunctions, divestitures, rescission and forfeitures. The DOJ has been particularly aggressive in enforcing antitrust laws in the payment cards industry. In litigation filed in 2010, the DOJ alleged that MasterCard, Visa and AMEX rules restrained merchants from encouraging consumers to use preferred payment forms, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The settlement reached with MasterCard and Visa required those card networks to discontinue enforcing rules preventing merchants from offering consumers discounts or other incentives for using particular payment networks, cards within that network, or other payment methods. *United States v. Am. Express Co.*, No. 10-4496, 2011 U.S. Dist. LEXIS 87560 (E.D.N.Y. July 20, 2011). American Express continues to litigate this case.

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that amendments to the Fair Credit Reporting Act eliminated private actions against consumer report users). And when Congress recently enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act"), Pub. L. 111-24, 123 Stat. 1734, it placed a number of the CARD Act's substantive provisions in a part of TILA that is not enforceable through private actions. *See* 15 U.S.C. § 1640(a) (creating private right of action for violations of *Part B* of TILA); 15 U.S.C. §§ 1665c-e (CARD Act provisions, placed outside Part B, requiring reduction in interest rates in specified circumstances, limiting penalty fees and requiring consideration of the cardholder's ability to repay).

Additionally, the DOJ frequently brings criminal prosecutions under the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C. § 1, the most commonly used criminal antitrust provision, establishes imprisonment and fines for individuals of up to ten years and $1 million and fines for corporations of up to $100 million for each count. The DOJ has the authority to seek greater fines under 18 U.S.C. § 3571, equal to twice the gross financial loss or gain resulting from a violation.

Section 5 of the FTC Act, 15 U.S.C. § 45, gives the FTC authority to seek remedies for unfair methods of competition, including antitrust violations, that include: (1) penalties up to $16,000 per violation, 15 U.S.C. § 45(m), 16 C.F.R. § 1.98; (2) injunctions and ancillary relief, 15 U.S.C. § 53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages . . . ." 15 U.S.C. § 57b(b). *See also FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (asset freeze).

D. It Is Up To Congress, Not This Court, To Determine Whether And When The Benefits Of Arbitration Should Be Sacrificed In Favor Of Class Action Proceedings.

Of course, Congress enacted the FAA and Congress can repeal or narrow it at any time. Congress could provide in another statute that private actions to enforce rights under the statute are exempt from the FAA. *See, e.g.*, Section 1414(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 15 U.S.C. § 1639c (providing generally that no "residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction"). It could even give an administrative agency the power to cut back on the FAA in specified circumstances. *See* Section 1028 of Dodd-Frank, 12 U.S.C. § 5518 (providing that, in specified circumstances, the Consumer Financial Protection Bureau, "by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties"). But the optimal balance between arbitration and litigation (or other dispute resolution mechanisms) is ultimately a legislative, not a judicial, function, and this Court should not engraft onto the FAA its own views of the proper policy.

CONCLUSION

For the foregoing reasons and the reasons set forth in AMEX's brief, *Amici* respectfully request that this Court reverse the Panel decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTERESTS OF *AMICI CURIAE*

Amici (Professors William S. Comanor, Einer R. Elhauge, Eleanor M. Fox, Herbert Hovenkamp, John B. Kirkwood, and Mark A. Lemley) have spent many years researching antitrust law and the economics of markets, and teaching law and graduate school courses on those subjects. *See* Appendix. Since 1890, federal antitrust law has both prohibited certain anticompetitive conduct and authorized parties injured by that conduct to obtain compensation. The private civil enforcement mechanisms in the Sherman Act and strengthened in the Clayton Act implement those important public policies of antitrust prohibition and compensation. *Amici* submit this brief to apprise the Court of the harmful consequences for antitrust enforcement of allowing private parties to insulate themselves from future antitrust liability through contractual arbitration provisions such as one preventing parties with individual claims too small to rationally justify the costs of pursuing them from pooling resources, even where the aggregate harm is large.[1]

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[1] Letters from the parties consenting to the submission of this brief have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Amici urge the Court to affirm the Second Circuit's holding that arbitration provisions cannot be enforced when, in a particular case, doing so would preclude the effective vindication of the private right of action specified in the Clayton Act. "[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies or from innovation producing new processes or new or improved products." 1 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 100a (3d ed. 2006). Achieving that objective is vital to our economy.

It has long been the law that contracts cannot abrogate the protection of federal statutes affecting the public interest, as the antitrust laws do. In harmonizing the administration of the antitrust laws with the FAA, the Court should not require enforcement of arbitration provisions that amount to prospective waivers of antitrust liability, consistent with the Court's many decisions conditioning arbitration on the "effective vindication" of statutory rights and with background rules of contract law.

The threat to antitrust enforcement is real. Antitrust claims depend heavily on economic analyses that simply cost too much for individual parties with small claims to prove liability and damages in individual proceedings. Unless those parties can pool their resources, their claims are effectively extinguished. Competitor suits involve

distinct antitrust injuries and different damages; they cannot substitute for actions by direct purchasers like the merchants here. Moreover, if the Court were to abandon the "effective vindication" standard, it would be easy for firms to develop and to impose through adhesion contracts other arbitration provisions that would also have devastating effects on antitrust claims. The result would be a severe deficit in antitrust deterrence and compensation.

ARGUMENT

At this stage, this case is not about whether the merchants have stated antitrust claims under the Sherman Act, or whether they can prove their claims. Rather, the issue is whether their claims cannot proceed—regardless of the merits—because an arbitration provision in the contracts (Card Acceptance Agreements) between American Express and the merchants prevents the merchants from pooling their resources to pay for the necessary costs of litigating the case under modern antitrust law.

In order to establish liability and damages, any merchant plaintiff would have to present an economic study to show that American Express has market power and the impact of its restrictive rule on the merchant's revenues. Plaintiffs submitted a declaration by an experienced economist estimating that the cost of the kind of expert economic analysis that would nowadays be required—whether in an arbitration proceeding involving a single merchant or in a class action in a federal district court—is likely to be greater than $300,000 but less than $2 million. (JA 86-90). The economist also estimated the maximum damages sustained by an average

merchant ($3,015) and by the named plaintiff with the largest volume of disputed American Express fees ($12,850). (JA 92). *See* Pet. App. 26a. Even after trebling, the maximum amount of damages that an individual merchant could recover would be only a small fraction of even the low-end estimate of the cost of the economic study that would be required.[2]

The arbitration provision in the form Card Acceptance Agreement for merchants with an annual sales volume of less than $10 million, (Pet. App. 7a; JA 88), precludes class arbitration, (Pet. App. 9a). That provision also appears to prevent any of the merchants from acting as a representative party for the others, (*id.*), thwarting a privately-negotiated arrangement whereby merchants pool their resources to fund a single bilateral arbitration presenting a representative antitrust claim applicable to all of them.

The Court of Appeals found that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." (Pet. App. 27a (quoting *Amex I*, 554 F.3d at 319)). Because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws"

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[2] The Second Circuit correctly deemed the prospect that the merchants could recover costs "inadequate to alleviate [its] concerns," Pet. App. 27a, in light of the Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (limiting recovery for expert witnesses to the statutory attendance fee). *See* 28 U.S.C. § 1821.

(Pet. App. 25a), the Second Circuit ruled that the arbitration provision ran afoul of the "firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." (*Id.* at 19a; *see also id.* at 50a). While careful to state that it was not holding class action waivers invalid in all cases or even in all antitrust cases (*id.* at 29a), the Second Circuit held that the plaintiffs had met their burden of proving the arbitration provision unenforceable as applied to their particular antitrust claim. (*Id.*).

I. FEDERAL ANTITRUST LAW AND ITS EFFECTIVE PRIVATE ENFORCEMENT ARE FUNDAMENTALLY IMPORTANT PUBLIC POLICIES.

A. The Protection of Free Markets Through the Federal Antitrust Laws Is An Important Public Policy.

"The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system. . . ." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (citation omitted). The Sherman and Clayton Acts play a vital role in upholding that national policy. The Court has referred to the "[a]ntitrust laws in general, and the Sherman Act in particular," as "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972). The federal antitrust laws "are as important to the

preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id.*; *see also Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) ("[T]he antitrust laws represent a fundamental national economic policy"); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963) (describing "role of antitrust policy in the maintenance of a free economy" as "indispensable"). Indeed, those policies are so embedded in our law that even before the Sherman Act, restraint of trade was an exception to the general reluctance of English and American courts to limit the enforcement of contracts on the basis of public policy. Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1024 & n.32 (1989).[3]

Antitrust policy is important not only to our economy, but also to our way of life. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social

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[3] *See generally* Restatement (Second) of Contracts § 186(1) (1981) ("A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade."); Restatement of Contracts § 514 (1932). ("A bargain in restraint of trade is illegal if the restraint is unreasonable."); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-81 (6th Cir. 1898) (Taft, J.) (surveying common law antecedents of the Sherman Act), *aff'd as modified*, 175 U.S. 211 (1899).

institutions." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The free market for goods and services has thus been seen by this Court as helping to promote and sustain a free marketplace of ideas.

B. Federal Antitrust Law Depends Upon Private Enforcement Actions.

Private enforcement has been a fundamental component of federal antitrust law from the very beginning. In 1890, when it passed section 7 of the Sherman Act, Congress not only authorized private parties to sue, but also gave them a then-novel incentive to do so by authorizing the award of treble damages to the successful plaintiff, and the recovery of costs and attorney fees. 26 Stat. 209, 210 § 7 (July 2, 1890), *superseded by* 38 Stat. 730, 731 § 4 (Oct. 15, 1914), *codified at* 15 U.S.C. § 15. In 1914, the Clayton Act enhanced the Sherman Act remedies by adding provisions allowing private plaintiffs to rely on government judgments to establish liability and to obtain injunctive relief as well as to recover costs and attorney fees in such cases. 38 Stat. 730, 731, 737 §§ 5, 16 (Oct. 15, 1914), *codified at* 15 U.S.C. §§ 16, 26. The private right of action has been "a bulwark of anti-trust enforcement," *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), and "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). The Court recognized that "the private cause of action plays a central role in enforcing this regime" in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (permitting arbitration of certain antitrust claims).

The purpose of the private right of action is both to deter violators by stripping them of the "fruits of their illegality" and "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (The purpose of private actions "was not merely to provide private relief, but was to serve the high purpose of enforcing the antitrust laws."); *Radovich v. NFL*, 352 U.S. 445, 453-54 (1957) ("These laws protect the victims of forbidden practices as well as the public."). To preserve the robust private enforcement scheme that Congress enacted, the Court has declined, "in the face of [the congressional antitrust policy]" to "add requirements to burden the private litigant beyond what is specifically set forth by Congress." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 n.9 (1982) (quoting *Radovich*, 352 U.S. at 454).

Congress did not rely solely on the federal government to enforce federal antitrust law. "[T]he U.S. antitrust system depends overwhelmingly upon private plaintiffs to police compliance." Douglas H. Ginsburg, *Costs and benefits of private and public antitrust enforcement: an American perspective, in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 39, 42 (Abel M. Mateus & Teresa Moreira, eds. 2010). "Congress created the treble-damages remedy . . . precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust

laws and deterring violations." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)); *see also* 2A Areeda & Hovenkamp, ¶ 330b ("Private enforcement thus increases the likelihood that a violator will be found out, and greatly enlarges the penalties and thereby helps discourage illegal conduct. The statutory scheme thus supplements public enforcement, which is inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations.").[4] Private enforcement frees the government to focus its resources "against more systemic violations for which no private plaintiff is likely to sue or for which criminal sanctions are desirable." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 690-91 (1982).

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[4] Private parties have recovered for antitrust violations as to which the federal government took no action. *See generally* Robert H. Landes & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008). The federal government has also filed antitrust litigation as a result of information brought to light in private litigation. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 503, 524 n.31 (E.D.N.Y. 2003) (citing *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003)).

C. Arbitration Agreements That Preclude Effective Vindication of Federal Antitrust Claims Conflict With Public Policy.

American Express contends that there is no room in the Court's recent Federal Arbitration Act (FAA) jurisprudence for an exception to enforcement when an arbitration provision would preclude a party from effectively vindicating the substantive right to sue for damages under federal antitrust law. (Pet'r's Br. 35). Petitioners discount the resulting gap in antitrust enforcement because "no one doubted that competitor lawsuits would work," (*id.* at 7) (quoting Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH L. REV. 1, 26 (1989)), and Congress "relied on the ability of competitors and the federal government to enforce federal law." (Pet'r's Br. 7).

Direct purchasers, like the merchants in this case, not competitors, are often the most appropriate parties to pursue antitrust deterrence and compensation. Reliance on suits by others would result in less deterrence and compensation than Congress intended. "The Act is comprehensive in its terms and coverage, protecting all who may be made victims of the forbidden practices by whomever they may be perpetrated." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)) (foreign government can sue). "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms*, 334 U.S. at 236. Only the merchants, as "direct purchasers" of the card payment processing services offered by American

Express, can sue to recover damages for alleged overcharges in the American Express discount fee, regardless of whether they are able to pass on some or all of the overcharge to consumers through higher prices. *Illinois Brick*, 431 U.S. at 745. Consumers, as indirect purchasers of the services, cannot sue in their own right. *Id.*[5]

Petitioners' suggestion (at 7) that competitors can adequately enforce antitrust laws in the merchants' stead, overlooks the public interest in providing compensation for antitrust injuries and naively supposes that the interests of competitors are always congruent with the interests of customers even for purposes of deterrence. The Court has stated that the antitrust laws protect "competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Many important restraints of trade will not motivate litigation by a competitor. An obvious example is a horizontal price-fixing cartel. None of

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[5] That does not mean Congress did not intend to prevent and compensate harm to consumers. As the Court noted in *Reiter*, 442 U.S. at 343, Congress declined to include in the Sherman Act a special provision to facilitate suits by individual consumers who may have suffered small and indirect injuries from antitrust violations—perhaps anticipating the difficulty in tracing the harm to the conduct that this Court later recognized in *Illinois Brick*. However, Congress did not limit enforcement to competitors to the exclusion of enforcement by other injured parties. Indeed, consumers can sue for damages when they have sustained cognizable antitrust injury. *Reiter*, 442 U.S. at 343 ("At no time, however, was the right of a consumer to bring an action for damages questioned.").

the members of the cartel can or will sue, and any competitors who are not members of the cartel will lack antitrust standing to challenge the cartel pricing. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 & n.8 (1986). Thus, members of the cartel would need only to include an arbitration provision preventing effective vindication of antitrust claims (like the one in this case) in their sales contracts to immunize their conduct from the private enforcement remedy in federal antitrust law. Petitioners' argument would leave the cartel's smaller customers without any recourse except the hope that the federal government will commit its limited enforcement resources to terminating the cartel. The deficit in deterrence is not limited to cartels—the same problem would arise if oligopolists use exclusionary agreements such as ties, which can "aid oligopolistic coordination by effectively allocating the market among oligopolists, making it difficult to increase market share by decreasing prices." Einer Elhauge, U.S. Antitrust Law & Economics 327 (2d ed. 2011).

Competitor-only enforcement would be inadequate for two additional reasons. *First*, the damages that excluded rivals can seek based on profits earned in a "but for" competive market scenario may be much smaller than the gains reaped from successful anticompetitive conduct, leading to insufficient deterrence. *Second*, the deterrent impact of a competitor suit will be diminished because the relief will not include damages for harm to customers. If the restraint tends to exclude competitors from the supply market, the competitor may sue for the injury that *it* suffers from the exclusion, but such actions

are relatively rare and do nothing to compensate injured customers. 8 Areeda & Hovenkamp ¶ 1767 ("[T]he foreclosed rival's injury is entirely independent of the amount or existence of any injury to buyers."). To the extent the anticompetitive conduct exploits customers, the competitor lacks antitrust standing to sue, because it is presumed to benefit from the defendant's wrongdoing. *See Atl. Richfield, Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990) (defining antitrust injury). Indeed, American Express's principal competitors (Visa and MasterCard) employed "honor all cards" rules (for debit cards) similar to the policy being challenged by the plaintiff merchants.

Nor is it normally possible for smaller customers to rely on enforcement of the antitrust laws by large customers. To begin with, the conduct at issue may only be directed at smaller customers (as appears to be the case here, as the form Card Acceptance Agreement was for smaller merchants). *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 458, 476 (1982) (challenged restraint was not applied to customers large enough to have in-house servicing organization). Further, even if one assumes—contrary to the situation here—that there are large customers injured in the same way as the too-small-to-sue-individually victims, the larger customer-competitor has no reason to try to help its smaller rivals by obtaining broad injunctive relief that would benefit them in a suit the larger firm alone filed and funded. Successful damages litigation by the larger customer alone provides no compensation to the smaller victims. And the restraints in the Card Acceptance Agreements would

preclude the smaller merchants from joining in an action along with the larger customer-competitor, even if invited to do so.

In such circumstances, the most likely result of the large-victim suit is a discriminatory settlement that mostly benefits the larger customer. If Wal-Mart had sued Visa and MasterCard (for tying debit cards to credit cards) only on its own behalf rather than as the lead representative of a class, it is likely that instead of reaching a broad industry-wide settlement, *see Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), Wal-Mart would have sought an agreement that gave Wal-Mart alone the right to refuse high cost debit cards, thereby enhancing its cost advantages vis-a-vis its smaller competitors. In sum, relying on bigger customers to sue in such situations would produce less prevention of antitrust violations and less compensation of victims than Congress intended.

II. THIS COURT HAS HARMONIZED FEDERAL STATUTES CONFERRING IMPORTANT SUBSTANTIVE RIGHTS, INCLUDING THE FEDERAL ANTITRUST LAWS, WITH THE FAA BY LIMITING ENFORCEMENT OF ARBITRATION AGREEMENTS WHEN NECESSARY TO EFFECTIVELY VINDICATE THE FEDERAL RIGHTS.

Unlike *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), this case involves a conflict in the administration of two federal statutes, not between a federal statute and a judge-made state law rule subject to federal preemption. When federal statutes intersect, as they do here, the Court's task is to

effectuate the intent of Congress. The Court generally does so by harmonizing the statutory schemes to the extent possible and giving precedence to one statute or the other only in the face of an irreconcilable conflict. As the Court explained in addressing the intersection of the Carriage of Goods by Sea Act and the FAA, "'[w]hen two statutes are capable of co-existence,' however, 'it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). "[T]he proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another, rather than holding one completely ousted," *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 392 (1981) (quoting *Silver v. NYSE*, 373 U.S. 341, 357 (1963)), as American Express urges the Court to do.

Repeals by implication are disfavored, and petitioners point to nothing in the text or history of the FAA that suggests that Congress, by requiring the enforcement of a particular type of contract—arbitration agreements—in the same manner as other contracts intended any repeal or limitation of federal antitrust law. The "preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985). Congress would not have expected that parties could shield themselves from prospective antitrust liability by contract, and so would not have expected them to do so by arbitration agreements.

"[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (holding right to recover liquidated damages under Fair Labor Standards Act nonwaivable).[6] That prohibition not only prevents contracts from nullifying statutes, but also in the antitrust context protects third parties, for example indirect purchasers, who are harmed but cannot sue.[7] Even putting aside the absence of actual

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[6] The antitrust law protection against market-wide harm is the paradigm of such a *public* rather than purely individual interest. *Newton v. Rumery*, 480 U.S. 386 (1987), involved a *retrospective* release of the right to sue under 42 U.S.C. § 1983, not a prospective waiver immunizing future violations of federal law. The Court has not analyzed the acceptance of restrictions on certain constitutional rights as a condition of receiving government benefits as a form of contractual waiver.

[7] Courts have long refused to allow parties to contract away statutory protections affecting public interests. *See, e.g., Narramore v. Cleveland, C., C., & St. L. Ry. Co.*, 96 F. 298, 302 (6th Cir. 1899) (Taft, J.). The rule is further justified in economic terms by a collective action problem that coerces individual parties to accede to terms offered by an entity with market power that produce market-wide harm, such that the terms cannot be said to be the product of a voluntary choice. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STANFORD L. REV. 253, 284-88 (2003) (explaining the collective action problem). Contract law also restricts agreements granting immunity from fault-based tort liability. "At one time, as we know, the law did not permit a person to exculpate himself by contract from the legal consequences of his negligence." *Maiatico v. Hot Shoppes, Inc.*, 287 F.2d 349, 350 (D.C. Cir. 1961) (Burger, J.); *see also R. R. Co. v. Lockwood*, 84 U.S. 357 (1873). Waivers of statutory and intentional violations are forbidden even under more permissive modern contract law.

negotiation over contracts like the form Card Acceptance Agreements, nullification of future antitrust liability cannot be considered a "benefit" for which American Express could have bargained. *See* Fin. Servs. Roundtable Br. at 8.

Further, the strong federal policy reflected in the antitrust laws has made this Court especially reluctant to read even federal statutes establishing an alternative regulatory regime as requiring an exemption from antitrust liability. *Carnation Co.*, 383 U.S. at 217-18 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 350-51). *See* Resp't Br. 32-33 (discussing implied immunity cases). Because of the many ways arbitration provisions can be drafted to neutralize antitrust claims, see *infra*, pp. 34-35, petitioners' approach would allow *private parties* to extend themselves prospective antitrust immunity, even in adhesion contracts, thereby carving out a broad (and unregulated) exception to private antitrust enforcement. The effective vindication standard, by contrast, preserves both arbitration agreements and antitrust enforcement save in the few instances in which they irreconcilably conflict. Consistent with the background rule of contract law, in such a conflict, precedence must go to the substantive statutory right.

See Maiatico, 287 F.2d at 350-51 (discussing modern rule); Restatement of Contracts §§ 574-575 (1932); Restatement (Second) of Contracts § 1915(1) (1981); 8 Richard Lord, Williston on Contracts § 19:24 (4th ed. 2012).

A. The Court Recognized in *Mitsubishi* That An Arbitration Agreement Should Not Be Enforced If It Would Nullify Prospective Antitrust Liability.

The FAA "simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" *Mitsubishi*, 473 U.S. at 625 (citation omitted). Nothing in the FAA suggests that Congress intended to allow private parties to use arbitration agreements to create contractual antitrust-free zones.

The Court in *Mitsubishi* rejected categorical arguments against the arbitration of antitrust disputes, *id.* at 630-36, before deciding whether the particular international arbitration proceeding to which the parties had agreed "will not provide an adequate mechanism" to resolve the particular federal antitrust claims asserted. *Id.* at 636. In a frequently-cited footnote, the Court took up the argument that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" because the arbitrators would apply Swiss law to the exclusion of United States antitrust law. *Id.* at 637 n.19 (citations omitted). The Court said it "would have little hesitation in condemning the agreement as against public policy," in the event that the effect of the agreement was prospectively to block federal antitrust claims. *Id.* The decision pointed to the Convention governing the enforcement of international arbitral decisions as a safeguard against an arbitration that failed to take

"cognizance of the antitrust claims and actually decide[] them." *Id.* at 638.

Mitsubishi does not support petitioners' view that the determination that federal antitrust claims are arbitrable in general is dispositive in every case. Before deciding that the agreement could be enforced, the Court in *Mitsubishi* considered *both* the categorical question and the particular question whether the specific agreement would operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations." *Id.* at 637 n.19 (citations omitted). The arbitration agreement governs only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [and] the [antitrust] statute will continue to serve both its remedial and deterrent function." *Id.* at 637.

B. This Court Has Repeatedly Conditioned the Enforcement of Arbitration Agreements on the Effective Vindication of Federal Statutory Rights.

This Court's decisions distinguish between contractual agreements to *resolve* disputes concerning statutory rights in a particular forum—including arbitration—and contractual agreements prospectively to *waive* substantive federal statutory rights. The former are permissible; the latter are not. As the Court recently explained in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2011), a "right to sue" under a federal statute does not necessarily mean a right to a judicial forum. But a right to sue is a "guarantee of the legal power to impose liability" for violating the law. *Id.* at 671; *see*

also Pet'r's Br. 26-27 (recognizing that distinction). Here, the Second Circuit found that the provisions of the arbitration agreement precluding class and representative actions work to extinguish a substantive right: "the legal power to impose liability" under Clayton Act section 4.[8]

Contracts prospectively waiving the right to enforce federal law, including antitrust law, are invalid. Most recently, the Court cited footnote 19 of *Mitsubishi* for the proposition that "a substantive waiver of federally protected civil rights will not be upheld." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). The Court concluded that the record was not sufficiently developed "to resolve in the first instance whether the CBA allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" *Id.* at 273-74 (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000)). As the citation to *Green Tree* suggests, the principle at issue is not limited to "costs associated with access to the arbitral forum" as petitioners contend (Pet'r's Br. at 18), but extends to any obstacle to the effective vindication of federal statutory rights in arbitration, whether the obstacle is cost (as in *Green Tree*) or union control (as in *Pyett*). The same principle applies to the prohibition of class or representative actions in the

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[8] By contrast, the Court in *Concepcion* had little fear that the arbitration agreement would prevent consumers from vindicating their rights because of several features of the arbitration agreement as amended after the class action suit was filed. 131 S. Ct. at 1753 (claims "most unlikely to go unresolved").

merchants' Card Acceptance Agreements with American Express. The record here showing that the agreements would prevent the merchants from effectively vindicating their federal statutory rights is sufficiently developed and seemingly uncontested.

Likewise, in *Vimar Seguros*, the Court considered whether a contractual forum selection clause could be enforced. The Court first concluded that nothing in the Carriage of Goods by Sea Act (COGSA) precluded the parties from agreeing to resolve their disputes in the foreign arbitral forum, and then took up the question whether the characteristics of the particular forum would preclude effective vindication of substantive rights under COGSA. Quoting *Mitsubishi*, 473 U.S. at 638, the Court noted that the district court had retained jurisdiction, and "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed," making it unnecessary to speculate about whether the arbitrators would apply COGSA or another standard that would afford equivalent relief. *Vimar Seguros*, at 540. The existence of an *ex post* safeguard was critical: "Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . ., we would have little hesitation in condemning the agreement as against public policy.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19).[9]

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[9] Petitioners focus exclusively on the Court's discussion of increased costs associated with the foreign arbitral forum.

The same conclusion follows from the Court's discussion of *Wilko v. Swan*, 346 U.S. 427 (1953), in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), stating that "*Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the 'right to select the judicial forum,' was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2)." *Id.* at 228-29 (citing *Wilko*, 346 U.S. at 345). In other words, the Court described *Wilko* as consistent with the principle that an agreement to arbitrate that is "inadequate to enforce" federal statutory rights will not be enforced. *Id.*[10] Nothing in the Court's subsequent decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (explicitly overruling *Wilko*), is inconsistent with the narrower rule the Court

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(Pet'r's Br. 25-26). But, in contrast to *Green Tree* and this case, the plaintiffs in *Vimar Seguros* did not argue that the increased costs associated with the foreign forum would prevent them from pursuing their claim at all, but rather that those costs would lessen the carrier's liability, contrary to COGSA. The Court harmonized COGSA with the FAA by reading COGSA "to exclude increases in the transaction costs of litigation." *Vimar Seguros*, 515 U.S. at 536. The language quoted in petitioners' brief (p. 26) concerns whether COGSA mandated a case-by-case tally of litigation costs, not whether courts must decide if costs would wholly frustrate the enforcement of federal statutory rights, as opposed to lessening the net recovery.

[10] There is nothing to the contrary in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The arbitrators did not base their decision that the arbitration agreement permitted class arbitration on any determination that the plaintiffs otherwise would be unable to enforce rights under the Sherman Act. Nor did their decision address the contention that the agreement was unenforceable. *Id.* at 1768.

deemed acceptable in *McMahon*. *See Rodriguez de Quijas*, 490 U.S. at 480 (noting that *Wilko* could have limited the prohibition of waiver of statutory rights to substantive provisions); *id.* at 481-82 (distinguishing the merely procedural features of the Securities Act which can be waived from the burden of disproving scienter, which implicitly cannot be waived).

III. THE COST, COMPLEXITY, AND NEED FOR EXPERT ECONOMIC ANALYSIS IN ANTITRUST CASES, INCLUDING THIS ONE, HAS INCREASED AS THE COURT HAS SUBSTANTIALLY MOVED AWAY FROM IMPOSING *PER SE* LIABILITY FOR MANY TYPES OF CONDUCT.

No "close inquiry" into the merits is needed to see that plaintiffs are required to produce *some* qualified expert economist's detailed analysis of the markets involved in order to vindicate their federal antitrust claims in this case. *See* Pet'r's Br. at 33. The need for an economic analysis of the relevant markets, and the considerable expense of obtaining one from a properly qualified economist, is a consequence of this Court's movement away from *per se* prohibitions in antitrust law and towards a more nuanced understanding of markets and competition. *See* John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 618-19 (2005) (the "narrowing or elimination of per se illegality has led to an expansion of factual inquires requiring expert testimony by professional economists.") (footnote omitted). Contrary to petitioners' assertions (Pet'r's Br. 50), an arbitrator would not be free to dispense

with a "complex and costly economics expert report" unless petitioners are willing to forego the arguments and defenses to liability under antitrust law that require the merchants to adduce such proof.

A. The Court Has Generally (and Properly) Moved Away From Per Se Liability Towards Rules Based on an Understanding of Markets Grounded in Economics.

Beginning with its landmark decision in *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court has gradually retreated from broad categories of *per se* liability, by insisting that "departure from the rule-of-reason standard must be based upon *demonstrable economic effect* rather than . . . upon formalistic line drawing." *Id.* at 58-59 (emphasis added). Thus, the Court explicitly struck down a *per se* rule against territorial divisions in vertical distribution agreements. Two years later, in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), the Court rejected a *per se* challenge to a horizontal pricing agreement, warning that "easy labels do not always supply ready answers" and that a literal approach to applying per se rules can result in rules that are "overly simplistic and often overbroad." *Id.* at 8-9. Rather, the Court's inquiry focuses on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Id.* at 19-20. The most recent and perhaps most dramatic illustration of this broad trend was *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), where the Court struck down a 90 year old *per se*

prohibition against vertical price fixing, saying: "Resort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.' To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects, and 'lack . . . any redeeming virtue.'" *Id.* at 886 (citations omitted).

The net result of this broad shift in Section 1 jurisprudence is to impose on most antitrust plaintiffs a much higher burden of proving market power and anticompetitive market effects than they would have faced prior to 1977. While *amici* believe that it has been largely desirable to build more rigorous economic analysis into the judicial resolution of antitrust disputes, this broad change has substantially increased the cost to the litigants of presenting and defending their cases. The ability of those harmed by the same alleged restraint of trade to share the necessary costs of expert evidence and discovery is even more central to the enforcement of the federal antitrust laws by parties with small individual injuries today than it was at the time of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

B. Plaintiffs Will Be Required To Present Expert Evidence on Market Power and Other Liability and Damages Issues.

The complaint in this case alleges that American Express tied acceptance of its corporate charge cards (said to be used by especially desirable customers) to its credit cards used by individuals. (JA 72a-75a). To sustain antitrust liability for that conduct, plaintiffs will have to show by expert

testimony based on analyses of market data, that the corporate charge cards are a distinct market in which American Express has "appreciable economic power." *Eastman Kodak*, 504 U.S. at 462 (citations and internal quotations omitted).

As the Court explained in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35 (2006), "[o]ver the years, . . . this Court's strong disapproval of tying arrangements has substantially diminished."[11] The Court repudiated its longstanding assumption that tying is inherently anticompetitive in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). *Ill. Tool Works*, 547 U.S. at 35-36. Underlying the Court's shift was a much more sophisticated understanding of markets explicitly grounded in economic analyses by academics. *Id.* at 45-46; *see, e.g., Eastman Kodak*, 504 U.S. at 472-79.

The merchants will also need expert economic testimony to prove damages. Unlike many other commercial disputes in which damages—say for the difference between the market and contract price in a breach of contract suit—may be computed from information in a market that is presumed to be functioning properly, antitrust cases do not presume a functioning market from which price information reliably can be derived. Rather, damages must be based on an economist's model of the "but for" market that would have existed if the defendant had not

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[11] For example, in *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949), the Court stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition."

violated the antitrust law. *See* Lopatka & Page, 90 CORNELL L. REV. at 686.

The upshot of the Court's increasingly nuanced analysis of antitrust issues is that it is not enough for a merchant to show an explicit tie in the agreements with American Express and point generally to American Express's dominant position in the charge card market. Those facts might once have sufficed to establish liability under some of the Court's now-repudiated tying precedents. No longer. Today, extensive analysis by an economist is required. *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academics Consensus in the Battle of the Experts*, 106 N.W. U. L. REV. 1261, 1271-77 (2012); *accord* 2 Areeda & Hovenkamp ¶ 309a (noting that "economic testimony is both ubiquitous and essential in antitrust cases").

The need for a rigorous economic analysis of liability and damages issues (as described in the declaration submitted in this case) is illustrated by the reliance on such analyses in the Second Circuit's decision affirming class certification in *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (involving claim that Visa and Master Card had tied acceptance of their credit cards to acceptance of debit cards under an "honor all cards" policy similar to the one imposed by American Express on the merchants in this case).[12]

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[12] To complicate the picture further, economists and law professors disagree about the effects of certain business arrangements in what are known as "two sided markets," which include the markets for payments services. *E.g.* Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the*

C. The Cost of the Required Economic Analysis in This Case Would Preclude Any Rational Merchant From Pursuing An Antitrust Action On Its Own.

The effect of the substantive legal requirements for proof of liability and the contractual prohibition against class or representative actions is that no rational merchant can pursue a claim in an individual arbitration. An arbitrator must apply the same substantive law to determine liability and damages as a court. Each merchant would therefore have to bear the cost of proving liability (through a market analysis) and its own damages (through a model of the "but for" market). The contractual prohibition against representative actions would not only prevent sharing the cost among a formal class, but also prevent the merchants from agreeing privately to fund a single case through which to establish liability. Free rider problems and a confidentiality provision in the arbitration agreement

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Economics of Two-Sided Markets, 2005 COLUM. BUS. L. REV. 515; Lloyd Constantine, *et al.*, *In re Visa Check/Mastermoney Antitrust Litigation: A Study of Market Failure in a Two-Sided Market*, 2005 COLUM. BUS. L. REV. 599; Adam J. Levitin, *Priceless? The Social Economic Costs of Credit Card Merchant Restraints*, 45 HARV. J. LEGIS. 1 (2008); Steven Semeraro, *The Economic Benefits of Credit Card Merchant Restraints: A Response to Adam Levitin*, 56 UCLA L. REV. DISC. 25 (2009). *Amici* take no position on any of these merits issues; the point is that under current law, expert analysis is required to establish liability and damages. The need to address questions specific to two-sided markets will increase the complexity and cost of the required analysis.

precluding the exchange of information among the merchants (*see* Pet. App. 92a) would impede private arrangements to share the costs of hiring the same expert to be used in a series of individual arbitrations (as *amicus* Chamber of Commerce suggests, Br. at 29-30). Moreover, it is hard to see how repeating the same expensive and complex expert presentation in a series of hundreds or thousands of individual arbitrations would promote any goal of the FAA—certainly it would not reduce dispute resolution costs.

While it is not possible to estimate the costs of the required expert analyses with precision, it is possible to state that the cost of reliable expert evidence would vastly exceed the damages that any individual merchant could recover. Nearly twenty years ago, experienced antitrust lawyers advised clients not to bother "bringing even the most routine (and soundest) of antitrust cases" unless they could spend $250,000 on economist expert fees. Charles Mueller, *Restoring the* Private *Antitrust Cases: Contingent Fees for Economic Experts*, 1994 L. & ECON. REV. 1, 2. The range estimated in the declaration submitted to the district court in this case is consistent with the experience of those *amici* who have been involved in antitrust litigation, and with the amounts approved by district judges in *pretrial* settlements of antitrust cases.[13]

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[13] *See e.g.*, *In re Lorazepam Antitrust Litig.*, 205 F.R.D. 369, 385 (D.D.C. 2002) (Hogan, C. J.) (approving $779,148 in expert fees and associated document costs); 2003 WL 22037741 at *10 (D.D.C. 2003); *Molecular Diagnostics Labs v. Hoffman-La Roche, Inc.*, No. 04-CV-1649, Decl. of William Isaacson, Apr. 25, 2008,

IV. FOREGOING ARBITRATION IN PARTICULAR CASES WHEN IT PREVENTS THE EFFECTIVE VINDICATION OF FEDERAL RIGHTS BETTER PRESERVES CONGRESSIONAL INTENT THAN ALLOWING PRIVATE PARTIES TO IMMUNIZE THEMSELVES FROM FEDERAL ANTITRUST LAW THROUGH OVERLY RESTRICTIVE ARBITRATION AGREEMENTS.

Petitioners and their *amici* have much less to say about the correctness of the Second Circuit's holding on the actual facts before the Court than they do about the perceived danger that courts would misapply the rule in other cases and frustrate implementation of the Court's recent decision in *Concepcion*. Those professions of fear that courts will limit arbitration by finding obstacles to "effective vindication" of federal rights everywhere are exaggerated. The greater danger is that parties will attempt to opt-out of antitrust liability through arbitration provisions.

A. Federal Courts Can Administer a Case-By-Case "Effective Vindication" Rule.

There is nothing about the Second Circuit's application of an "effective vindication" standard that lends itself to indiscriminate extension or abuse.

ECF No. 103-2, p. 32 ($2.074 million in professional fees, primarily experts), approved Dec. 29, 2008, ECF 111, p.6.

This is not a borderline case. Petitioners have never really disputed that the costs of hiring an economist to perform the kind of analysis required to establish liability and damages far exceeds what a rational merchant with damages of $12,000 or less and the possibility of recovering $38,000 or so would spend. Unlike the situation in *Concepcion*, where AT&T Mobility's amended arbitration agreement virtually guaranteed recovery in an individual arbitration, an individual merchant cannot go it alone here. Without an unaffordable expert economic analysis, the claims will fail.

Nor is there anything about the circumstances of this case that suggest that the merchants seek to proceed as a class to "force [American Express] to pay ransom" (Defense Resource Inst. Br. 16) through sheer force of numbers. The merchants' claim is that American Express has injured all of them through an illegal requirement imposed in identical form agreements. It is particularly appropriate for those injured by the same market-wide harm to cooperate in seeking redress, regardless of whether that is in a judicial or arbitral forum. Allocating the cost of obtaining relief among those who would benefit from it is consistent with settled principles of unjust enrichment. *See Trustees v. Greenough*, 105 U.S. 527 (1881) (awarding fees for recovering a common fund).

Petitioners and their *amici* express an unfounded systemic distrust of the federal judiciary (*see, e.g.*, Pet'r's Br. 52); the days of entrenched judicial hostility to arbitration are long past, and lower courts will read a decision affirming the Second Circuit in this case in the context of the Court's entire corpus of recent decisions, including *Stolt-Nielsen* and

Concepcion. The Second Circuit's decision made clear that the party seeking to avoid arbitration on the ground that it would prevent effective vindication of federal statutory rights has the burden of proof, Pet. App. 25a, and the requisite evidence is "not easily assembled." *Id.*; *see also* Resp't Br. 30-32. The judge-made rule at issue in *Concepcion* was much broader than the holding in this case, because it invalidated arbitration clauses even in circumstances when arbitration imposed no practical impediment to the vindication of an individual consumer's claim. There is no reason to fear that federal courts will undo *Concepcion* in the name of "effective vindication" of federal statutory rights.

B. Arbitration Agreements Can Be Designed, or Amended, to Effectively Vindicate Federal Statutory Rights.

Declining to enforce arbitration agreements that prevent vindication of federal statutory rights will not lead to abandonment of arbitration. Businesses can negotiate arbitration procedures that allow for the effective vindication of federal statutory rights, or adapt them as needed, to particular cases. Indeed, businesses that can amend their contracts unilaterally can enforce arbitration procedures suited to the vindication of federal statutory rights even after litigation begins, as AT&T Mobility did in *Concepcion*, 131 S. Ct. at 1744. American Express has thus far chosen not to propose an arbitration process that would allow the merchants to pool their resources to pursue their antitrust claims, but there is no reason to believe that American Express or other firms would be so unyielding once the Court

clarifies that arbitration agreements cannot be used to immunize against prospective antitrust liability.

On the other hand, firms seeking protection from federal antitrust (or other federal statutory) liability will have an incentive to craft provisions that prevent effective vindication of such claims, if permitted to do so. Typically, arbitration agreements are comprehensive and drafted to resolve with efficiency the mine run of disputes anticipated to arise from a particular contractual relationship. In choosing arbitration as the forum in which to resolve their disputes, parties to such agreements do not intend to waive substantive federal statutory rights. *Mitsubishi*, 473 U.S. at 628. The "effective vindication" standard facilitates the use of arbitration by preventing inadvertent prospective waivers of federal statutory protections, thereby ensuring the use of arbitration as a dispute resolution rather than dispute disposal process.

Petitioners' view that arbitration agreements should be enforced even when they do not permit the effective vindication of certain federal statutory rights would increase needlessly the transaction costs of reaching arbitration agreements with parties that have sufficient economic strength to negotiate them. That could well lead to narrower arbitration clauses and less arbitration. Some parties (even to adhesion contracts) may also resist accepting blanket arbitration clauses that produce a risk of waiving substantive rights under the antitrust laws, even when they would otherwise readily agree to arbitrate commercial disputes. And for arbitration agreements in contracts of adhesion, it is hard to defend implicit

prospective waivers of statutory rights in the name of the free contract principles underlying the FAA.

C. Petitioners' Arguments Present A Grave and Immediate Danger to the Enforcement of Federal Antitrust Law and Other Important Federal Statutes.

If arbitration agreements could block the effective vindication of federal rights, parties with market power could use such agreements to nullify the work of Congress across a broad swath of economic regulation. It would be short work for firms to devise arbitration provisions other than restrictions on class and representative actions that will have the effect of dooming many federal antitrust claims. For example, a general arbitration agreement might forbid outright the presentation of expert testimony, in the interests of reducing time and expense, or because the arbitrators will be drawn from a pool already possessing expertise in a particular field or industry. However sensible such an agreement might be in resolving technical disputes over, say the quality of textiles or construction, it would be ill-adapted to resolving an antitrust claim that requires the plaintiff to prove market power through an economic analysis. An arbitration provision that bars experts as an *evidentiary* matter would have the same effect in an antitrust tying case as the arbitration provision here, which bars experts as an *economic* matter. The evidentiary rule would apply much more broadly, however, and would block claims even by single parties that could pay for expert reports.

The same would be true of a contract that chose a shorter limitations period than applicable federal antitrust law, or that cut off the right to recover attorney fees, or costs, or that designates a standard of liability less favorable than under an applicable federal statute, imposes a limitations period shorter than provided in an applicable federal statute, or restricts the statutorily-authorized award of treble damages.[14] Yet petitioners' arguments would require courts to enforce such limitations, regardless of their impact on the vindication of substantive federal statutory rights.

Petitioners' position that any provision of an arbitration agreement must be enforced even when it prevents the effective vindication of a "legal power to impose liability" thus poses a much greater threat of contractual nullification of a wide range of federal statutory rights, including rights under the federal antitrust laws, than the Second Circuit's narrow holding poses to administration of the FAA.

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[14] *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), required the enforcement of an arbitration agreement notwithstanding a prohibition against the award of "extracontractual" damages, finding the term ambiguous as applied to treble damages authorized by the Racketeer Influenced and Corrupt Organizations Act, so that it was premature to determine whether statutory rights under RICO could be effectively vindicated under the arbitration agreement.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with over $7.3 trillion in annual revenues and nearly 16 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and pay $182 billion in dividends to shareholders.

Relying on the Federal Arbitration Act's policies promoting arbitration and this Court's vindication of those policies over the past half-century, many of *amici*'s members use arbitration agreements in millions of their contractual relationships. By reducing the high litigation costs associated with resolving disputes in court, those agreements create cost sav-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

ings that result in lower prices for consumers, higher wages for employees, and benefits for the entire national economy.

Virtually all present-day arbitration agreements require that disputes be resolved on an individual, rather than class-wide, basis. As this Court explained in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), class procedures are irreconcilable with the simplicity, informality, and expedition that are characteristic of arbitration.

The Second Circuit in this case refused to enforce the parties' agreements to arbitrate on an individual basis, instead holding that respondents' federal antitrust claims must proceed as a putative class action in federal court. Because the Second Circuit's ruling threatens to destroy the advantages of arbitration and to deter companies from entering into arbitration agreements, *amici* have a strong interest in this case.

SUMMARY OF ARGUMENT

The decision below seeks to carve out a new "effective vindication of rights" exception to the FAA's mandate that arbitration agreements be enforced according to their terms. But neither the FAA itself nor any other federal statute authorizes such an exception. The Second Circuit's exercise in judicial policymaking cannot stand.

To begin with, although the court of appeals purported to ground its analysis in the "federal substantive law of arbitrability" created by the FAA, its rule finds no support in that statute. This Court in *Concepcion* specifically rejected a State's effort to impose

class procedures on arbitration in order to facilitate "small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. 1740, 1753 (2011). That holding rested on this Court's conclusion that class arbitration is "not arbitration as envisioned by the FAA," "lacks its benefits," and is therefore "inconsistent with the FAA." *Ibid.* There is no basis for believing that the FAA views the fundamental—and therefore protected—characteristics of arbitration differently when a plaintiff's claim arises under federal law.

Nor do the federal antitrust laws justify the Second Circuit's decision to condition the enforcement of an arbitration agreement on the availability of class proceedings. It is well-established that antitrust claims may be arbitrated, and nothing in the antitrust laws suggests that Congress intended to require that antitrust arbitrations proceed on a class-wide basis.

Although the panel located support for its newly minted rule in this Court's pre-*Concepcion* decisions, its reliance on those decisions is misplaced. In *Green Tree Financial Corp.–Alabama* v. *Randolph*, 531 U.S. 79 (2000), this Court indicated in *dictum* that a party might resist arbitration on the ground that costs *unique to arbitration*—such as filing fees and similar arbitration-specific forum costs—preclude access to the arbitral forum altogether. Similarly, *dictum* in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), at most supports the notion that courts need not enforce provisions in arbitration agreements that would bar a party from pursuing a claim under United States antitrust law at all.

Moreover, the Second Circuit's "effective vindication" test would in practice create a procedural morass that would completely undermine the objectives of the FAA. Indeed, that test is not administrable even on its own terms. There is no way for courts to reliably forecast, at the very outset of litigation, the total costs of proving a claim or the expected recovery that would result. Doing so would require courts to resolve myriad factual issues—including disputed questions on the merits that have been contractually assigned to an arbitrator—and to determine whether a class could be certified if the case remains in court.

This fact-specific and time-intensive inquiry is precisely what the FAA was designed to prevent. Even if a court eventually upholds the arbitration agreement, the victory would be a Pyrrhic one because the process will have negated at the outset most of the benefits of arbitration. And because there are no clear or objective standards for conducting this inquiry, it empowers judges who are hostile to arbitration to impede the enforcement of arbitration agreements, contrary to the FAA's policy of promoting arbitration.

Finally, the Second Circuit was mistaken in assuming that formal class-action procedures are ever essential to the vindication of claims. On the contrary, arbitration claimants may use a variety of informal means to pool resources and share any significant litigation expenses (including expert-witness costs) to the extent those expenses need be incurred in arbitration. Furthermore, the vast majority of disputes that arise are individualized and accordingly cannot be brought as collective or class actions. Especially when such claims are relatively small, arbitration is the only realistic means for resolving

these disputes. On the whole, therefore, arbitration greatly increases access to justice for small claims. Under the Second Circuit's rule, however, enforcing arbitration agreements would become so burdensome and so uncertain that many businesses will abandon arbitration altogether, with adverse consequences for millions of consumers, employees, and small businesses nationwide.

ARGUMENT

I. COURTS LACK AUTHORITY TO DENY ENFORCEMENT OF ARBITRATION AGREEMENTS BASED ON A POLICY CONCERN THAT ARBITRATION MIGHT NOT BE COST-EFFECTIVE.

The FAA sharply limits the power of courts to refuse to enforce arbitration agreements. In providing that such agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to guarantee that "courts * * * place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted). The FAA precludes courts from "rely[ing] on * * * judicial policy concern[s] as a source of authority" for refusing to enforce arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009); see also *Concepcion*, 131 S. Ct. at 1747 (FAA was intended to eliminate the "'great variety' of 'devices and formulas' declaring arbitration against public policy"). Unless the FAA or another federal statute prohibits enforcement of an arbitration agreement according to its terms, or permits the application of a state-law rule barring enforcement of the agreement, the arbitration agreement must be enforced.

No such federal statutory authority supports the Second Circuit's view that courts may decline to enforce agreements to arbitrate claims individually upon concluding that there is "more than a speculative risk" that plaintiffs may be unable to "effectively" vindicate their statutory rights without a class action. Pet. App. 11a, 22a, 86a. That rule lacks any sound basis in the FAA, federal antitrust law, or this Court's decisions.

A. The FAA Does Not Permit Courts To Refuse To Enforce Arbitration Agreements On The Ground That They Preclude Class Procedures.

The Second Circuit purported to ground its analysis in the "federal substantive law of arbitrability." Pet. App. 16a, 78a, 96a. In particular, the court posited that the savings clause in Section 2 of the FAA authorizes courts to refuse to enforce an arbitration agreement upon finding that the agreement would "remov[e] the plaintiffs' only reasonably feasible means of recovery" under the antitrust laws. Pet. App. 12a, 95a–96a.

The Second Circuit erred in construing the savings clause to authorize courts to condition enforcement of arbitration provisions on a case-by-case assessment of whether class-wide procedures may be necessary to enable plaintiffs to vindicate their statutory claims. In *Concepcion*, this Court expressly rejected as irrelevant the dissent's contention "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," explaining that, under the FAA, States cannot condition the enforcement of arbitration agreements on the availability of class-action

procedures "even if it is desirable for unrelated reasons." 131 S. Ct. at 1753.

There is no basis under the FAA for applying a different rule when a plaintiff's cause of action is supplied by federal law. The principle that undergirds *Concepcion*'s holding—that the FAA mandates "enforc[ing] agreements to arbitrate according to their terms"—applies "***even when*** the claims at issue are federal statutory claims." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added).

Concepcion's holding rested on this Court's conclusion that "class arbitration" is "not arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 131 S. Ct. at 1753. For this reason, requiring parties to permit class-wide resolution of claims in arbitration is tantamount to prohibiting arbitration altogether—a result that is manifestly at odds with the FAA's "design[] to promote arbitration." *Id.* at 1749. Under *Concepcion*, courts may not reject fundamental features of arbitration—such as the resolution of disputes on a bilateral basis or the waiver of jury trials—by "say[ing] that such agreements are exculpatory" or by invoking "public-policy disapproval of exculpatory agreements." *Id.* at 1747.

That conclusion is just as true when a plaintiff brings claims under federal law as when the plaintiff's claims arise under state law. It would be bizarre indeed if the "federal substantive law of arbitrability" invoked by the Second Circuit required the very result—conditioning the enforcement of arbitration agreements on the availability of class procedures—that this Court declared in *Concepcion* to be "inconsistent with the FAA." 131 S. Ct. at 1748.

Moreover, nothing in the text or history of the FAA indicates that the statute's conception of the nature of arbitration and the fundamental characteristics protected by the FAA—streamlined discovery, bilateral proceedings, and a decision maker selected by the parties—vary depending on whether federal or state-law claims are at issue. While Congress remains free to prescribe different rules of decision for enforcing arbitration agreements in the context of federal and state claims, it certainly has not done so in the FAA itself.

B. The Federal Antitrust Laws Do Not Afford Courts The Power To Reject Arbitration Agreements That Waive Class Procedures.

Federal and state claims do stand on a different footing under the FAA in one respect: Congress, unlike a state legislature, may create exceptions to the FAA's pro-arbitration mandate. But the Court has repeatedly held that "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Pyett*, 556 U.S. at 258 (same).

Neither the Second Circuit nor respondents contend that the federal antitrust laws "expressly preclude[] arbitration or * * * expressly provide[] a right to bring collective or class actions." Pet. App. 17a n.5. Nor could they.

To begin with, as this Court has repeatedly held, "claims arising under the Sherman Act," like other federal statutory claims, "may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500

U.S. 20, 26 (1991); see also *Mitsubishi*, 473 U.S. at 636. Moreover, nothing in the federal antitrust laws indicates that Congress intended to preclude parties from waiving class procedures in arbitration. Indeed, the notion that the federal antitrust laws require that class procedures be available to private plaintiffs, whether in arbitration or in court, is ahistorical. Both the Sherman Act and the Clayton Act were enacted more than a half-century before the birth of the modern class action in Rule 23.[2] To the contrary, in enacting the Sherman Act, Congress specifically "rejected a proposal to allow a group of consumers to bring a collective action as a class." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979).[3]

The court below nonetheless concluded that individual arbitration of the plaintiffs' antitrust claims would "conflict with congressional purposes manifested in the provision of a private right of action in the [Sherman Act]." Pet. App. 17a n.5. It relied heavily on this Court's observation that "'private suits provide a significant supplement'" to public enforcement of the antitrust laws. Pet. App. 27a–28a. But this Court rejected that reasoning in *Mitsubishi*, explaining that "the fundamental importance * * * of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634; see *id.* at 634–640. There is no "inherent conflict"

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[2] Just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S. Ct. at 1752), class arbitration and class-action litigation did not exist in anything like their modern form when Congress passed the Sherman Act in 1890 and the Clayton Act in 1924.

[3] In subsequently enacting the Clayton Act, Congress did not discuss class proceedings at all. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 27 (1989).

(*Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987)) between individual arbitration and the purpose of the antitrust laws; claimants can recover the same individual remedies (such as treble damages and attorneys' fees) in arbitration as in court.[4]

Moreover, the Court has rejected the notion that "the mere formulation of the cause of action" in a statute is "sufficient to establish the contrary congressional command overriding the FAA." *CompuCredit*, 132 S. Ct. at 670 (internal quotation marks omitted). Quite the opposite: This Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *Id.* at 671. Indeed, it has explained, even when Congress has ***expressly*** provided for class or collective procedures for statutory claims, that "does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted).[5]

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[4] In any event, to the extent there is any validity to the Second Circuit's view that "[t]he Clayton Act's fee-shifting provisions [are] inadequate to alleviate our concerns given the low expert reimbursement rate" that the statute authorizes (Pet. App. 53a), the proper response is to petition Congress to provide for greater recovery of expert fees, not to manufacture a judicial exception to the FAA. As Chief Judge Jacobs noted, Congress's decision to allow prevailing parties to recover attorneys' fees and costs—but not all expert witness fees—indicates that "Congress deem[ed] these incentives sufficient to encourage private suits," a determination to which courts should defer. Pet. App. 138a.

[5] The case for requiring class procedures was arguably stronger in *Gilmer* than it is here, because the ADEA—unlike the antitrust laws—expressly provides for collective actions (see 29 U.S.C. § 626(b)). Nevertheless, this Court stated that ADEA

Finally, contrary to the Second Circuit's view (Pet. App. 18a), an arbitration agreement that would have been fully enforceable prior to the adoption of Rule 23 in its current form cannot now be declared unenforceable simply because class actions are thought to provide a more economical means to proceed. The right to compel arbitration—*i.e.*, to require specific performance of arbitration agreements—that the FAA creates is part of the "federal substantive law of arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Rule 23, by contrast, was promulgated under the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)).[6]

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claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted). Here, where Congress did not expressly require class procedures, there is certainly no basis for a court to impose such a requirement. Cf. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720 (1967) (when a statute "expressly provides the remedies for vindication of the cause, other remedies should not readily be implied").

[6] Put differently, Rule 23 confers "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 331 (1980). And it is well established that, under the FAA, the parties may "'trade[] the procedures * * * of the courtroom'"—including discovery rules and class or collective procedures—"'for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

C. This Court's Pre-*Concepcion* Decisions Do Not Authorize Invalidation Of Arbitration Agreements That Waive Class Actions.

The Second Circuit relied heavily on this Court's decisions in *Green Tree Financial Corp.–Alabama* v. *Randolph*, 531 U.S. 79 (2000), and *Mitsubishi*. Pet. App. 19a–25a. Given that the decision below is squarely inconsistent with *Concepcion*, it is not surprising that, upon inspection, these cases offer no support for the rule adopted by the panel.

1. *Randolph* involved a plaintiff's contention that her arbitration agreement was unenforceable because it did not "affirmatively protect [her] from potentially steep arbitration costs." 531 U.S. at 82. While rejecting that challenge as speculative, this Court indicated in *dicta* that courts might "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive" (*id.* at 92), stating that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum" (*id.* at 90).

Contrary to the Second Circuit's view, the Court's discussion of "vindication" in *Randolph* was limited to circumstances in which an arbitration agreement imposes excessive costs on the claimant that are ***unique to arbitration***—*i.e.*, costs that would not be incurred if the plaintiff's claim were instead brought in a judicial forum. That is why *Randolph* refers to "arbitration costs" (531 U.S. at 90) and "arbitration expenses" (*id.* at 84), and the two examples it offers—"filing fees" and "arbitrators'

costs" (*ibid.*)—both are costs unique to the arbitral forum.

Thus, to the extent that *Randolph* permits consideration of costs, the focus is not on the ordinary costs of proving a claim, but instead on whether the price of gaining entry to the arbitral forum is prohibitively greater than the equivalent filing fees and similar forum access charges that the plaintiff would incur in federal court. The driving principle is one of ***unique limitations on access*** to the arbitral forum. See Pet. App. 144a (Jacobs, C.J., dissenting from denial of rehearing en banc) (*Randolph* "is about the price of admission" rather than "expense generally"); accord Pet. App. 111a (Daniels, J.) (*Randolph* is limited to "'costs which would not be incurred in a judicial forum'") (quoting *Ball* v. *SFX Broad., Inc.*, 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001)). As Judge Fogel has explained, *Randolph* is "confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims." *Kaltwasser* v. *AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011).

In this case, the Second Circuit did not conclude (and respondents did not contend) that the cost of accessing the arbitral forum is "prohibitively expensive"—*i.e.*, that the difference between arbitral fees and judicial filing fees is so great as to prevent plaintiffs from pursuing arbitration. The panel erred in citing *Randolph* for the completely different notion that an arbitration agreement may be invalidated whenever a court concludes that the costs of ***proving*** a claim are high in relation to its value.

2. The Second Circuit's reliance on *Mitsubishi* is equally mistaken. A footnote in that case states in dictum that if the agreement's "choice-of-forum and choice-of-law clauses operated in tandem" to eliminate "a party's ***right to pursue*** statutory remedies for antitrust violations," the Court would likely invalidate those provisions. 473 U.S. at 637 n.19 (emphasis added). *Mitsubishi* thus addressed a situation in which the agreement would operate to bar the plaintiff from pursuing an antitrust claim under United States law ***at all***. See also *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539–541 (1995) (noting that *Mitsubishi* would provide recourse if arbitrators were not permitted to apply United States law). That is not the situation here: If respondents elect to pursue their claims, an arbitral forum is available to hear those claims and to render a decision on the merits.

Respondents may say that an arbitral forum is not "practically" available to them because they do not wish to incur the alleged expenses of proving their antitrust claims. But that is wholly different from the concern raised in *Mitsubishi* about categorical waivers of the right to present an antitrust claim under United States law at all.

II. THE SECOND CIRCUIT'S RULE IS NOT ADMINISTRABLE AND WOULD FRUSTRATE THE OBJECTIVES OF THE FAA.

This Court has repeatedly declared that a "prime objective" of the FAA "is to achieve 'streamlined proceedings and expeditious results.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi*, 473 U.S. at 633). That requires "an expeditious and summary hearing" on motions to compel arbitration "with only restricted inquiry into factual issues."

Moses H. Cone, 460 U.S. at 22. The FAA would be frustrated if courts could hinder speedy resolution of disputes by "impos[ing] prerequisites to enforcement of an arbitration agreement." *Preston*, 552 U.S. at 356.

The Second Circuit's vindication test, however, does exactly that. It effectively "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). The decision below therefore cannot be reconciled with the core objectives of the FAA.

A. The Court Of Appeals' "Vindication" Test Is Not Administrable Even On Its Own Terms.

The decision below enables a party resisting arbitration to transform any motion to compel arbitration into satellite litigation about whether arbitration would be an economically reasonable means of resolving the dispute. As Judge Fogel has put it, if the Second Circuit were correct, "every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the value of a plaintiff's award with the potential cost of proving the plaintiff's case." *Kaltwasser*, 812 F. Supp. 2d at 1049.

First, if this Court endorses the vindication argument, plaintiffs' lawyers undoubtedly will seek to invoke it broadly in an effort to avoid this Court's holding in *Concepcion*. Although this case involves an antitrust claim, plaintiffs have sought to invalidate arbitration agreements on "vindication" grounds in cases asserting claims arising under a variety of federal statutes. As Chief Judge Jacobs observed, the panel's vindication test "can be used to challenge

virtually every consumer arbitration agreement" (Pet. App. 137a) because it "is always so easy to assert" that a claim cannot effectively be vindicated on an individual basis (Pet. App. 134a).[7] Indeed, "every class counsel and every class representative who suffers small damages" can simply "hir[e] a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss." Pet. App. 137a.

Second, because the Second Circuit's premise is that class procedures would be available if a claim proceeds in court, the case-by-case "vindication" analysis necessarily would require courts to determine whether the claims at issue could be certified under Rule 23: If they could not be, there would be no valid reason for refusing to enforce the parties' agreement to forgo class procedures. Cf. Pet. App. 139a (court must resolve "whether the putative class is duly constituted and properly represented, without which there is no class claim").

But this Court has explained repeatedly that the class-certification determination requires considerable factual development, including with respect to some issues that overlap with the merits of the putative class claim. As this Court recently pointed out, "[f]requently [the] 'rigorous analysis'" required by Rule 23 "will entail some overlap with the merits of the plainitff's underlying claim. That cannot be helped. '[T]he class determination generally involves

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[7] Although the Second Circuit expressly limited its vindication rationale to cases in which the plaintiffs have pleaded claims under federal law, that is cold comfort, given the ease with which plaintiffs can dress up ordinary state-law claims in the garb of a federal cause of action.

considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Wal-Mart*, 131 S. Ct. at 2551–2552 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982)); see also *Concepcion*, 131 S. Ct. at 1751 (discussing complexity of class-certification inquiry).

Third, the vindication test is unworkable because there is no objective or reliable way to forecast, at the very outset of litigation, the total cost of proving a claim or the expected recovery that would result.[8] That is all the more so because courts that generally have limited, if any, experience with arbitration may erroneously presume that arbitration would involve the same hurdles and obstacles that a plaintiff would face in court.[9]

Either way, moreover, courts would have to resolve myriad factual issues. As Chief Judge Jacobs put it, the panel's decision "makes the district court the initial theater of arbitral conflict on the merits (how else does a district court estimate the costs of a litigation?)." Pet. App. 136a. The kinds of questions that a court would need to resolve include, but by no means are limited to:

- The nature and amount of factual evidence a plaintiff is likely to put forward in support of

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[8] The "arbitration costs" and "arbitration fees" referred to in *Randolph* (531 U.S. at 84, 90 & n.6), by contrast, are generally easy to ascertain by reference to the terms of an arbitration agreement and rules of the arbitral forum.

[9] In fact, arbitration is much more informal than litigation and spares litigants from the rigors of the federal rules of evidence and civil procedure. In addition, in individual arbitration there is no need for the plaintiff to spend months or years litigating the class-certification issues specified in Rule 23.

the allegations in its complaint, and the evidence that the defendant is likely to submit in response.

- The estimated costs of document-based discovery and depositions that would be permitted in arbitration (which requires knowing the identity of the witnesses).
- Whether expert testimony is needed and, if so, which experts and at what cost.
- The prospects that the parties might settle an individual arbitration, making a formal arbitration hearing unnecessary.
- Whether the features of the arbitration provision at issue make it possible for plaintiffs to vindicate their claims effectively on an individual basis.

To undertake all of these inquiries (and more) would require district judges to hold a not-so-mini-trial at the outset of every case in which a party seeks to resist arbitration—and that trial would have to address not only the costs of litigating in court but also the different costs of litigating in arbitration (see note 9, *supra*), so that the district court could compare the two.

These inquiries are likely to require plenary discovery, briefing, and argument about what types of evidence and analysis are needed to arbitrate the case, including how expensive merits discovery and the arbitral hearing would be. The parties "predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's cost of proof." *Kaltwasser*, 812 F. Supp. 2d at 1049. Other "evidentiary issues" may preclude the

court from accepting the parties' submissions "at face value." *Fromer* v. *Comcast Corp.*, 2012 WL 3600298, at *6 (D. Conn. Aug. 21, 2012); cf. *LaVoice* v. *UBS Fin. Servs., Inc.*, 2012 WL 124590, at *8 (S.D.N.Y. Jan. 13, 2012) ("whether LaVoice's expert's testimony would even be admissible remains unclear to the Court"). Courts will be forced to confront "*Daubert* and other vexed questions" merely to determine whether a case will proceed in arbitration or in court. Pet. App. 139a (Jacobs, C.J.). And even once questions of admissibility are resolved, the dispute may ultimately come down to picking sides between "battling experts." *Fromer*, 2012 WL 3600298, at *6.

Worse still, as the Second Circuit did in this case, courts might take a shortcut by electing to "uncritically adopt[] the affidavit of a paid consultant" hired by one of the parties. Pet. App. 137a (Jacobs, C.J.). The sole basis for the Second Circuit's determination that respondents cannot cost-effectively arbitrate their claims was a single self-serving affidavit from a paid expert retained by plaintiffs' counsel. Pet. App. 14a–15a. And that affidavit is flimsy at best, lacking any empirical rigor: It merely guesses that the cost of the market study will fall "in the middle of the range" for such studies, anywhere from "several hundred thousand dollars" to "$1 million" (Pet. App. 14a, 51a–52a; see also Pet. App. 147a (Jacobs, C.J.) (respondents' expert offered only "a guess" of "nearly one million dollars"))—and does not even purport to show that a market study of similar complexity would be required in an individual arbitration.[10]

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[10] Indeed, the affidavit was based entirely on data from complex, trial-court litigation lasting several years, and was not based on any experience with individual arbitration. See J.A. 88–91.

District courts applying the Second Circuit's test have followed suit, uncritically adopting the cost estimates fed to them by plaintiffs' attorneys and their hired experts. See, *e.g.*, *In re Elec. Books Antitrust Litig.*, 2012 WL 2478462, at *3 (S.D.N.Y. June 27, 2012) (appeal pending); *Raniere* v. *Citigroup Inc.*, 827 F. Supp. 2d 294, 314–315 (S.D.N.Y. 2011) (appeal pending); *Sutherland* v. *Ernst & Young LLP*, 768 F. Supp. 2d 547, 551–552 & n.5 (S.D.N.Y. 2011) (appeal pending).[11]

Fourth, the vindication rule articulated by the Second Circuit is especially problematic because it is devoid of any objectively administrable standard. Indeed, the Second Circuit disclaimed any effort to identify objective benchmarks that may be applied consistently across cases. Instead, it indicated that courts must always conduct this inquiry on an *ad hoc* basis. See Pet. App. 29a ("each waiver must be considered on its own merits, based on its own record").

The indeterminate contours of this vindication test make it every bit as "toothless and malleable" as the *Discover Bank* rule that this Court rejected in *Concepcion* (131 S. Ct. at 1750)—if not more so. As Chief Judge Jacobs pointed out, the panel's decision is "unbounded" and "does not vouchsafe what is meant for a suit to be 'economically feasible,' or when a hypothetical 'economically rational' plaintiff might

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[11] The court below and several district courts have criticized defendants for not submitting competing cost estimates from their own hired experts. Pet. App. 11a, 27a; *Fromer*, 2012 WL 3600298, at *6; *In re Elec. Books*, 2012 WL 2478462, at *3. By effectively ***mandating*** a battle of the experts, these courts multiply the costs of enforcing arbitration agreements and the number of evidentiary issues that must be resolved, highlighting the problems with the Second Circuit's approach.

be willing to pursue a claim." Pet. App. 136a, 138a. And unlike the rule at issue in *Concepcion*, which at least "require[d] that damages be predictably small" (131 S. Ct. at 1750), the Second Circuit would apparently find plaintiffs unable to vindicate claims worth "several hundred thousand dollars" or more (Pet. App. 14a, 26a).

Further contributing to the manipulability of the Second Circuit's test is the requirement that a plaintiff need only show "more than a speculative risk" (Pet. App. 11a) that it will be unable to vindicate its own federal statutory rights. But nowhere does the panel explain what quantum of evidence is required to push a plaintiff's asserted risk across the line from "speculative" to "more than speculative."

Unsurprisingly, the malleability of the Second Circuit's vindication test is already being exploited to "work[] mischief" in the district courts. Pet. App. 136a (Jacobs, C.J.). Thus, courts within the Second Circuit have held that the availability of fee-shifting for prevailing parties is not sufficient incentive for pursuing meritorious claims, notwithstanding Congress's apparent determination to the contrary. See, *e.g.*, *Raniere*, 827 F. Supp. 2d at 316 (mandatory "[f]ee shifting alone is not per se sufficient to render a class action waiver enforceable"); *Sutherland*, 768 F. Supp. 2d at 553 (S.D.N.Y. 2011); cf. *Arguelles-Romero* v. *Super. Ct.*, 109 Cal. Rptr. 3d 289, 306 n.20 (Ct. App. 2010) ("There is an element of self-fulfilling prophecy to these declarations; it cannot be the law that attorneys who may specialize in representing consumers can control whether a class action waiver is unenforceable simply by refusing to represent plaintiffs on an individual basis.").

Moreover, the Second Circuit indicated that courts must consider plaintiffs' "risk of losing"—and hence of not recovering their attorneys' fees—in the *ad hoc* vindication analysis. Pet. App. 27a, 91a; see also, *e.g.*, Pet. App. 138a (Jacobs, C.J.) (noting that the panel "demands a 'risk-of-losing' premium"); *Fromer*, 2012 WL 3600298, at *6; *Raniere*, 827 F. Supp. 2d at 317; *Sutherland* v. *Ernst & Young LLP*, 856 F. Supp. 2d 638, 642 (S.D.N.Y. 2012).[12] But courts are not in the business of forecasting a plaintiff's precise odds of success at the outset of a case—nor is it likely that such forecasts are even possible. Cf. *LaVoice*, 2012 WL 124590, at *8 (dismissing such forecasts as "pure speculation"). On this approach, moreover, the less meritorious the claim (and thus the greater the risk of loss), the more likely that the plaintiff will be able to evade arbitration—a perverse result that would magnify the cost of defending against frivolous claims.

B. The Second Circuit's Approach Produces Precisely The Results That The FAA Was Enacted To Prevent.

The Second Circuit's vindication test, if upheld, would have disastrous consequences for the enforcement of arbitration agreements. Routine motions to compel arbitration will require burdensome discovery, formal hearings, and time-consuming interlocutory appeals. Courts will be required to assess nu-

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[12] Indeed, in one case the district court refused to enforce arbitration agreements even though the defendant offered to pay expert witness fees for prevailing claimants, because "eligibility for such an award would depend on her success in the arbitral forum, an uncertainty that the Second Circuit noted in *American Express*." *Sutherland*, 856 F. Supp. 2d at 642.

merous issues related to the merits of the plaintiffs' claims, precisely what the FAA is designed to prohibit. And the court's broad discretion in conducting this largely standardless inquiry opens the door to a resurgence of the very judicial hostility to arbitration that the FAA was intended to eradicate.

First, the Second Circuit's approach would generate prolonged and expensive delays in the enforcement of arbitration agreements—even though "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984). If the decision below is upheld, costly and extended threshold litigation will routinely impede the enforcement of arbitration in countless cases. See pages 16–19, *supra* (discussing factual issues).

In many cases, the vindication test would render arbitration "too expensive and too slow to serve ***any*** of its purposes." Pet. App. 140a (Jacobs, C.J.) (emphasis added). Furthermore, "even if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may already have spent many times the cost of an arbitral proceeding just enforcing the arbitration clause." Pet. App. 139a.

Second, as Chief Judge Jacobs observed, this evidentiary showdown over the feasibility of arbitration inevitably will devolve into an accelerated litigation of the merits. Pet. App. 139a. For starters, "it cannot be decided whether any discovery or testimony is needed at all without deciding if the claim is dismissible" on the pleadings as a matter of law and whether a class may be certified. *Ibid.* In many cases, the court would also need to adjudicate "such prior questions as the statute of limitations and laches, control-

ling law, res judicata, etc." *Ibid.*; see, *e.g.*, *Raniere*, 827 F. Supp. 2d at 315 (addressing choice-of-law and statute-of-limitations disputes in order to apply vindication test). Because the Second Circuit's approach requires a court to address so much of the merits, it "effectively displaces arbitration with a trial court proceeding whenever lawyers assert a class claim." Pet. App. 139a.

Even a preliminary judicial inquiry into the merits conflicts with this Court's precedents holding that merits issues are to be decided by the arbitrator, not by a court. See, *e.g.*, *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006). By requiring courts' deep involvement in assessing issues relating to the merits of the plaintiff's claim, the Second Circuit's test plainly violates this principle.

Third, by conditioning the enforceability of arbitration agreements on an inherently speculative and indeterminate inquiry, the Second Circuit standard empowers federal and state court judges who are hostile to traditional, bilateral arbitration to impede the enforcement of such agreements.

As this Court has explained, Congress enacted the FAA as "a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001). That judicial hostility to arbitration "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted). By passing the FAA, Congress sought "to reverse the

longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24.

Widespread judicial hostility to arbitration nonetheless persists today among many state and federal courts. See generally Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1432–1443 (2008) (documenting continued resistance to arbitration among lower courts); Br. of Chamber of Commerce of U.S. at 13–27, *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 783668 (same). The Second Circuit's vague, malleable, and manipulable standard provides an avenue for these courts to act upon that hostility.

Fourth, the indeterminate and case-specific nature of the Second Circuit test carries another significant adverse consequence: Parties to an arbitration agreement could not know at the time of contracting whether their agreement will be enforced with respect to any particular subsequently arising dispute. By casting a cloud over the enforceability of all arbitration agreements—even those, as here, involving business parties—the "vindication" standard thus eviscerates one of Congress's prime goals in enacting the FAA: to provide parties with certainty regarding the enforceability of such agreements.[13] As we discuss below, the inevitable consequence of that uncertainty will be a reduction in the use of arbitration to

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[13] State-law unconscionability standards are applied as of the time of contracting precisely to avoid the tremendous uncertainty regarding the enforceability of agreements that results from a standard based on post-contracting events. See, *e.g.*, *Tuckwiller* v. *Tuckwiller*, 413 S.W.2d 274, 276–280 (Mo. 1967).

resolve disputes, again the precise opposite of Congress's purpose.

III. THE SECOND CIRCUIT'S ASSUMPTION THAT IT IS NOT POSSIBLE TO VINDICATE MODEST-SIZED CLAIMS ON AN INDIVIDUAL BASIS IN ARBITRATION IS MISTAKEN.

The Second Circuit's decision ultimately rests on the concern that some plaintiffs might be unwilling or unable to pursue their claims without class actions. As this Court has said time and again, however, judicial policy concerns about arbitration are not a valid basis for refusing to enforce otherwise-valid arbitration agreements. See, *e.g.*, *Concepcion*, 131 S. Ct. at 1747; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768–1770 (2010); *Pyett*, 556 U.S. at 270. The responsibility for addressing such policy considerations lies exclusively with Congress, not the courts.

Even if public policy were relevant, however, the Second Circuit's rule could not be sustained. *First*, the panel was incorrect to assume that formal class-action procedures are essential to the vindication of small claims. On the contrary, arbitration claimants have ready access to many other, informal means to pool resources and share common costs so that each claimant bears only a fraction of the total expense. These informal measures can play the same cost-sharing role in arbitration that class actions perform in litigation, but without all of the burdensome procedural formalities of judicial litigation.

Second, the decision below failed to consider the full range of disputes to which arbitration applies. The vast majority of claims that could be asserted

under arbitration agreements are highly individualized disputes that cannot be brought as collective or class actions. For these disputes, arbitration is typically the only realistic means of resolving individual claims. If the decision below were upheld, however, many businesses likely would abandon arbitration altogether, depriving millions of consumers, employees, and small businesses of this critical benefit. Surely any policy analysis therefore must consider this increased access to justice for the vast majority of disputes.

A. Class-Action Procedures Are Not Necessary For Claimants To Pool Resources And Share Costs.

1. The Second Circuit was incorrect to assume that individual arbitration would require each plaintiff to bear the full cost of retaining an expert to conduct an antitrust market study. Arbitration claimants bringing overlapping or identical claims based on common facts are not each required to reinvent the wheel. Although bilateral arbitration requires each claimant to bring a separate proceeding, nothing about arbitration prevents claimants (or their attorneys) from sharing the expenses of expert witnesses, fact investigation, and attorney preparation.[14]

This case is particularly amenable to cost-sharing among claimants. The plaintiffs here are businesses that could easily identify and solicit large numbers of similarly situated businesses to file indi-

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[14] Similarly, nothing precludes plaintiffs' attorneys from sharing successful strategies or from pooling information and evidence gathered from non-confidential sources.

vidual claims across which litigation costs can be spread. Indeed, although the named plaintiffs are small businesses, the class includes many large retailers with the resources to facilitate such organization.

In the initial iteration of its opinion in this case, the Second Circuit suggested that respondents might not be able to share the costs of the market study because their arbitration agreements require that information obtained through the arbitration proceedings be kept confidential. Pet. App. 92a. But contrary to the panel's reading, that requirement would not prevent plaintiffs from collectively preparing their arbitration demands and assembling the evidence for their *prima facie* cases before arbitration begins. In fact, another district court recently rejected the argument that a similar confidentiality provision barred a group of retail grocers from sharing the purportedly necessary $1.4 million cost of expert testimony for their antitrust claims against wholesale grocers. See *In re Wholesale Grocery Prods. Antitrust Litig.*, 2011 WL 9558054, at *5 (D. Minn. July 5, 2011) (appeal pending). Because the plaintiffs could "cooperate amongst themselves and other [p]laintiffs to share arbitration costs" and could "share costs stemming from analysis of public information," they could afford to arbitrate their claims individually even though the expert witness fees far exceeded the value of any individual claim. *Ibid.*

2. This sort of coordination and cost-sharing has become increasingly common. Indeed, respondents themselves are forced to admit that this is a "rare case" in which a plaintiff is "truly unable * * * to share costs," recognizing that their (erroneous) in-

terpretation of the confidentiality clause is their only basis for such a contention. Br. in Opp. 16; see also *id.* at 23.

Given the strong financial incentives, it is no surprise that at least some plaintiffs' lawyers are beginning to recognize that pursuing serial individual arbitrations (or small-claims actions) can be an economically viable business model—especially in view of the ability to reach multiple similarly situated individuals by means of websites and social media. For a discussion of this phenomenon, see Carolyn Whetzel & Jessie Kokrda Kamens, *Opt Out's Use of Social Media Against Honda In Small Claim Win Possible "Game Changer,"* Bloomberg BNA Class Action Litig. Rep. (Feb. 10, 2012).

For example, prior to *Concepcion* a plaintiff had filed a putative class action alleging that AT&T improperly measures the amount of data used by iPhones and iPads, thereby supposedly causing customers to pay more for data usage than they otherwise would. The district court, following this Court's holding in *Concepcion*, compelled the plaintiff to arbitrate in accordance with his arbitration agreement. *See Hendricks* v. *AT&T Mobility LLC*, 823 F. Supp. 2d 1015 (N.D. Cal. 2011).

Subsequently, counsel for Hendricks filed separate demands for arbitration on behalf of over 1,000 claimants—each making virtually identical allegations and relying on the same expert witness whom Hendricks had proffered in support of his class-action lawsuit. The parties have been arbitrating the claims on an individual basis.

Another lawyer "set up a website to recruit plaintiffs" to bring multiple identical small-claims cases

alleging improper marketing of credit information. See Sara Foley & Jessica Savage, *Court Filings Boost Revenue*, Corpus Christi Caller Times, Nov. 27, 2010, *at* http://www.caller.com/news/2010/nov/27/court-filings-boost-revenue/. Similarly, a former lawyer who sued an automaker in small claims court after opting out of a class action set up a website to publicize her case, along with profiles on Twitter and Facebook and a video on YouTube. She since was "contacted by hundreds of other car owners seeking guidance in how to file small claims suits if they opted out of" the class action. Linda Deutsch, *Honda Loses Small-Claims Suit Over Hybrid MPG*, Associated Press, Feb. 1, 2012, *at* http://www.msnbc.msn.com/id/46228337/ns/business-autos/t/honda-loses-small-claims-suit-over-hybrid-mpg/.

These examples demonstrate that, especially in an era in which the Internet and social media can be used effectively to reach out to potential claimants, individual plaintiffs (and their counsel) can readily identify other businesses or individuals with similar claims who can share in the costs of pursuing claims. For this reason, the Second Circuit was mistaken in concluding that class actions or class arbitration are the only effective means for individual plaintiffs to share the costs of proving small claims.

B. The Second Circuit's Decision Would Have Disastrous Consequences For Consumers And Employees Who Need A Less Expensive Alternative To Litigation.

The Second Circuit's analysis suffers from yet another flaw: It disregards the fact that bilateral arbitration overwhelmingly ***increases*** access to justice for millions of individuals throughout the Nation.

This Court has repeatedly observed that "arbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.[15] In the absence of enforceable arbitration agreements, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281. The Court has likewise recognized that "[a]rbitration agreements * * * may be of particular importance in employment litigation, which often involves smaller sums of money." *Circuit City*, 532 U.S. at 123.

For most of these disputes, the ***only*** realistic access to justice is through arbitration. If consumers, employees, and small businesses with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they will be priced out of the judicial system entirely. Even when cases are brought as putative class actions, classes are certified only about 20 percent of the time. See, *e.g.*, Thomas Willging & Shannon Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 635–636, 638 (2006). Among consumer class actions that are certified, moreover, the percentage of consumers who participate in the en-

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[15] See also, *e.g.*, *Concepcion*, 131 S. Ct. at 1749 ("[T]he informality of arbitral proceedings * * * reduc[es] the cost and increas[es] the speed of dispute resolution."); *Stolt-Nielsen*, 130 S. Ct. at 1775 (observing that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed").

suing settlements is often astonishingly small—routinely on the order of one percent or less.[16] In other words, for many consumers and employees, "it looks like arbitration—or nothing." Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008) (addressing employment arbitration).[17]

Consumers and employees also benefit from the informality of arbitration, which frees them from the

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[16] *See* Deborah Hensler *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 96 (RAND Inst. for Civ. Justice 2000), *at* http://www.rand.org/pubs/monograph_reports/MR969/; Cheryl Miller, *Ford Explorer Settlement Called a Flop*, The Recorder, July 13, 2009, at 1 (only 75 out of "1 million" class members—or 0.0075 percent—participated in class settlement); *Synfuel Techs., Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 649–650 (7th Cir. 2006) (a "paltry three percent" of class members had filed claims under the settlement); *In re Apple iPhone 4 Prods. Liab. Litig.*, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012) (between 0.16 and 0.28 percent of class members filed claims); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 145 (S.D.N.Y. 2008) (2,700 out of 10 million class members made claims); *Palamara* v. *Kings Family Rests.*, 2008 WL 1818453, at *1–2 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement); *Berry* v. *Volkswagen Grp. of Am., Inc.*, 2012 WL 2094490, at *1–2 (Mo. Ct. App. June 12, 2012) (appeal pending) (177 out of 22,304 class members—or 0.79 percent—submitted claims).

[17] It is not just those consumers and employees with disputes who benefit from arbitration. The lower cost of dispute resolution reduces the costs of doing business, which manifests in lower prices for consumers and higher wages for employees. See, *e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91; Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 5–7 (1995); cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991).

"procedural" and "evident[iary]" hurdles that often stymie plaintiffs in courts. See, *e.g.*, John Cooley & Steven Lubet, *Arbitration Advocacy* ¶ 1.3.1 (2d ed. 2003).[18] For this reason, consumers and employees tend to fare better in arbitration than in court.

For example, a recent study of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time. Christopher Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 845 (2010). Likewise, employees who arbitrate their claims are more likely to prevail than employees who litigate. See, *e.g.*, Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). And awards obtained by employees in arbitration are typically the same or even larger than court awards. See Michael Delikat & Morris Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Res. J. 56, 58 (Nov. 2003–Jan. 2004).

The Second Circuit evidently assumed that its approach would be a win-win proposition for individuals and small businesses, because courts could

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[18] For example, the American Arbitration Association's consumer rules contemplate "desk arbitrations," in which the arbitrator can resolve the dispute on the papers if neither party requests a hearing. Am. Arbitration Ass'n, *Consumer-Related Disputes Supplementary Procedures* § C-5, *at* http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004127&RevisionSelectionMethod=LatestReleased (visited Dec. 7, 2012). The AAA also has procedures designed to handle employment disputes involving modest sums. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Res. J. 9, 11 (2003).

compel arbitration when they deem it to be beneficial to those parties and deny it when they perceive it to be harmful to them. Instead, however, the principal effect of the Second Circuit's decision—if it is upheld—would be to deprive consumers, employees, and other individuals of the benefits of arbitration by deterring its use. By injecting "uncertainty as to procedure and outcome" in the enforcement of arbitration agreements, the decision below greatly intensifies "the risk [of] using arbitration clauses due to the uncertainty present." Gregory Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008).

Like the rule invalidated in *Concepcion*, the Second Circuit's rule "sacrifices the principal benefit of arbitration" by "mak[ing] the process slower, more costly, and more likely to generate procedural morass." 131 S. Ct. at 1751. And even when arbitration is enforced, "the party seeking to arbitrate may already have spent many times the cost of an arbitral proceeding just enforcing the arbitration clause." Pet. App. 139a (Jacobs, C.J.). Given these trade-offs, it is "hard to believe" that many businesses would continue to offer their customers and employees the option of arbitrating their disputes. Cf. *Concepcion*, 131 S. Ct. at 1752. Instead, companies will abandon arbitration altogether.

If the decision below is allowed to stand, arbitration and its benefits would no longer be made available to many consumers and employees. It would dampen the national economy and increase the burden on the already-clogged court system to handle cases that otherwise would have been arbitrated.

Because that result is contrary to the FAA's objectives, the decision below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MARCY S. COHEN, AUGUSTUS I. DUPONT, HAYWARD D. FISK, WILLIAM GRAHAM, FRANK R. JIMENEZ, ROBERT LONERGAN, CLIFFORD B. STORMS AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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December 28, 2012

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, amicus curiae International Association of Defense Counsel states the following:

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

Marcy S. Cohen is General Counsel and Managing Director of ING Financial Holdings Corp., a large financial services company.

Augustus I. duPont is Vice President, General Counsel and Secretary of Crane Co., a diversified manufacturer of highly engineered industrial products, which is listed on the New York Stock Exchange.

Hayward D. Fisk was Vice President, General Counsel and Secretary of Computer Sciences Corporation, a Fortune 150 publicly traded computer software and systems integration company listed on the New York Stock Exchange, for nearly 20 years. Previously, he was Vice President and Associate General Counsel of a

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

The views expressed in this brief are those of the individual *amici*, and not those of the companies or organizations with which they are currently or were previously affiliated.

major publicly traded telecommunications company, listed on the New York Stock Exchange. Mr. Fisk served on the international board of the Association of Corporate Counsel, and on the national board of the American Society of Corporate Secretaries. Prior to his retirement from the full-time practice of law, he was a senior partner of DLA Piper LLP (US). He is of counsel to Anderson Kill Wood & Bender in its Ventura, California office. He is a member of the Board of Governors of the Kansas University School of Law.

William Graham was Senior Vice President, General Counsel and Secretary of Bethlehem Steel Corporation, a publicly traded company listed on the New York Stock Exchange. In his 11 years as General Counsel of Bethlehem he was a member of the company's senior management team.

Frank R. Jimenez is the chief legal and government affairs officer of a "large cap" public company traded on the New York Stock Exchange. He was previously the chief legal officer of two U.S. S&P 500 companies.

Robert Lonergan was Executive Vice President and General Counsel of Rohm and Haas Company, a large publicly traded chemical manufacturing company listed on the New York Stock Exchange. Mr. Lonergan was a member of the Science, Technology and Law Panel of the National Academies and he was a trustee of the Institute for Law and Economics at the University of Pennsylvania.

Clifford B. Storms is the former Senior Vice President and General Counsel of CPC International, a publicly traded company listed on the New York Stock Exchange. He is a former member of the Connecticut ADR Panel and the Panel of Arbitrators of the American Arbitration Association Large Complex Case Program. Mr. Storms was a Trustee Emeritus of the Food and Drug Law Institute and a former member of the Advisory Committee of the Parker School of Foreign and Comparative Law, Columbia University.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits.

The individual *Amici* have served as senior legal officers for public companies for many years. They are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of *amici* have had decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. *Amici* are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business

and commerce and in alleviating the burdens on courts and parties.

The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

Amici believe that the decisions of the Second Circuit in this case are inconsistent with the purposes of the Federal Arbitration Act ("FAA") and both the long-standing and recent teaching of this Court and will deter many companies from incorporating arbitration as a dispute resolution mechanism in their commercial dealings.

PRELIMINARY STATEMENT

The named plaintiffs in these consolidated cases are retail businesses that entered into a written Card Acceptance Agreement with American Express. The gravamen of plaintiffs' complaint is that American Express's "Honor All Cards" policy, which requires merchants that wish to accept American Express cards to accept American

Express's charge cards as well as its credit cards, constitutes an unlawful tying arrangement under § 1 of the Sherman Act. The named plaintiffs seek to bring suit on behalf of "all merchants that have accepted American Express charge cards." App. 4a. The Card Acceptance Agreement contains a provision requiring bilateral (or "individual") arbitration, rather than class arbitration (sometimes referred to as a "class-arbitration waiver"). C.A. App. A156; *see* App. 8a-9a. The arbitration provision is "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended. C.A. App. A156; *see* App. 67a.

At issue in this case is a provision, of a kind commonly used in arbitration agreements, that bars class actions and class arbitration. In *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*), the Second Circuit panel held that such a bar ran afoul of the federal "substantive law of arbitration" because the litigation expense of proving an antitrust claim – specifically the cost of adducing expert testimony – would make it too expensive for claimants to pursue individual arbitrations. The panel held that a class action may proceed in court notwithstanding the agreement to arbitrate. *Id.* at 320.

This Court vacated *Amex I* and remanded the case to the Second Circuit for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*

Corp., 130 S. Ct. 1758 (2010) ("*Stolt-Nielsen*").[2] *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

On remand the two-judge panel[3] reached the same conclusion as it had in *Amex I*. *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 198 (2d Cir. 2011) ("*Amex II*"), relying on the same "expert evidence" proffered by the merchants as to the high cost of producing expert evidence to support their claims.

Shortly after the Second Circuit issued its opinion in *Amex II*, but before the mandate issued, this Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011) ("*Concepcion*"), in which the Court held that state law may not be invoked to invalidate a class-action waiver in an arbitration agreement on the ground

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[2] *Stolt-Nielsen* held that a party to an arbitration agreement cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party *agreed* to do so...because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775. In this case, the arbitration clause explicitly prohibits class arbitration.

[3] Justice Sotomayor, originally a member of the panel, was elevated to the Supreme Court and did not participate in the Second Circuit's deliberations.

that the only economical way to litigate the claim is through a class action. *Id.* at 1748.

After supplemental briefing on the impact of *Concepcion*, the same Second Circuit two judge panel issued that court's third opinion, *In re Am. Express Merchs' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("*Amex III*") In *Amex III*, the panel again concluded, relying on the same affidavit of a consultant for the merchants, that expert costs would be so high relative to potential recovery that the only effective way to litigate the antitrust claims was by a class action and that the class action waiver is unenforceable. *Amex III*, 667 F.3d at 218-219.[4] *En banc* review was denied, with vigorous dissents, *In re Am. Exp. Merchants' Litigation*, 681 F.3d 139 (2d Cir. 2012).

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[4] The Second Circuit recognized that in light of *Stolt-Nielsen* it could not require American Express to participate in class action arbitration, but by declaring the class action waiver unenforceable it opened the way for the merchants to pursue a class action in court, imposing an even greater economic burden on the party which sought to enforce the arbitration clause that contains a class-arbitration waiver.

SUMMARY OF ARGUMENT

The decision and judgment of the Court of Appeals for the Second Circuit should be reversed because the that court's decision and reasoning are inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* and this Court's precedents on enforceability of arbitration agreements.

The *Amex* decisions are based on a concern that without the class-action vehicle claimants will not be able to "vindicate" their rights because of the "costs" of arbitration vis-a-vis the small size of potential individual recovery. This Court in *Concepcion* rejected this policy rationale and held that the argument that plaintiffs do not have sufficient incentive to pursue individual claims cannot undermine the FAA.

Amex III creates a sweeping exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties, and swallows the rule established by this Court's recent teaching on the enforceability of arbitration agreements that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings," and that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. 1740 at 1748 (2011).

The Second Circuit's position frustrates the goals of arbitration by multiplying claims and lawsuits and by forcing parties to incur additional attorneys' fees. It is in conflict with, and impairs, the strong federal policy favoring the enforcement of arbitration agreements expressed in Federal Arbitration Act, 9 U.S.C. §1, *et seq*. It also demonstrates the "judicial hostility towards arbitration," which the FAA was intended to foreclose. *Nitro-Lift Technologies L.L.C. v. Lee*, 568 U. S. ____, No. 11-1377, slip. op. at 5 (Nov. 26, 2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

In short, *Amex III* is incompatible with the longstanding principle of federal law, embodied in the FAA and numerous precedents of this Court, favoring the validity and enforceability of arbitration agreements.

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge the Court to reverse the Second Circuit's decision in *Amex III* and to confirm its holdings in *Concepcion*, *Stolt- Nielsen* and other cases, which recognize the overriding Congressional policy of encouraging arbitration. This Court should make it clear that there is no "public policy" exception to that overriding policy simply based on the cost of arbitration relative to the potential recovery in individual arbitration.

The Second Circuit invoked a "public policy" rationale to hold that arbitration agreements containing class-action waivers are unenforceable when applied to federal statutory claims if a claim would not be "economically rational" to pursue individually. *See In re Am. Express Merchs.' Litig.*, 667 F.3d at 214.

The Second Circuit's *Amex* decisions are based on a concern that without the ability to aggregate claims through a class-action, lawyers will be unwilling to pursue "small" claims. Whether factually correct or not (the Second Circuit does not cite any record evidence to support such an hypothesis), a majority of this Court in *Concepcion*

rejected this policy rationale. *See Concepcion*, 131 S. Ct. at 1753 (rejecting the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," because rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons").

The Second Circuit's reading of the FAA and this Court's cases is incorrect. The Second Circuit's doctrine makes it likely that federal district courts will be the initial venue for what should be arbitration issues on the merits,[5] and

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[5] *Amex III* greatly increases litigation costs and complexity because it effectively requires a judicial proceeding whenever a class claim based on federal law is asserted. The party seeking to arbitrate the individual claims in accord with the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months of court proceedings to enforce the arbitration clause. Courts will have to inquire into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata, whether the putative class is proper and whether the named claimant is a proper class representative, whether and what and how much expert testimony would be required and how costly it would be, and how much discovery is appropriate. Moreover, because *Amex III* repeatedly relies on the failure of American Express to rebut the merchants' expert affidavit on the cost of expert proof (*see, e.g.*, *Amex III*, 667 F.3d 204, 218), a

(continued...)

can be used to defeat class-action waivers altogether.

Amex III is incompatible with this Court's repeated explanation of the legislative policy underlying the FAA, to wit that the FAA "embodies [a] national policy favoring arbitration," *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Concepcion*, 131 S. Ct. 1740, 1745. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration", *Moses H. Cone*, 460 U.S. 1 at 24-25 & n.32, reinforces the "fundamental principle that arbitration is a matter of contract," *Concepcion* at 1745; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776, 2777 (2010); *Stolt-Nielsen* at 1774; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), and makes clear that courts must enforce arbitration agreements according to their terms,

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[5](...continued)
party seeking to enforce arbitration will have to spend considerable resources to engage its own consultant to rebut claims of the economic infeasibility of pursuing claims in individual arbitrations. The issues the trial court decides may create grounds for appeal, adding more expense and delay. *See* Chief Judge Jacobs' dissent from denial of *en banc* review in *Amex III*, 681 F.3d 139, 142-149.

Volt Information Sciences, 489 U.S. 468, 478; *Stolt-Nielsen* at 1763; *Concepcion* at 1748.

A. The Second Circuit Misinterprets *Concepcion* and Other Precedents of This Court

Compelled class arbitration defeats the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. *See Concepcion*, 131 S. Ct. at 1748 ("[requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA.").

From the perspective of parties who enter into arbitration agreements, there are substantial advantages to arbitration:

> [P]arties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes.
>
> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.

Concepcion, 131 S. Ct. At 1748-49 (citations omitted)

The Second Circuit read *Concepcion* as being limited to its facts, to apply only to cases in which the claims in arbitration are state law claims. *See*

Amex III, 667 F.3d 204, 213-214, 219. According to the Second Circuit, *Concepcion* does not apply to the arbitration of federal statutory claims.

Concepcion has a far broader reach. *Concepcion* rested on this Court's conclusion that "class arbitration" is "not arbitration as envisioned by the FAA," because it lacks the speed and efficiency of individual arbitration, requires the burdens and "formality" of class-action litigation, and "greatly increases risks to defendants" given the magnified stakes and absence of meaningful judicial review. 131 S. Ct. at 1751-1753. Requiring parties who have contracted to arbitrate on an individual basis to agree to arbitrate on a class-wide basis as a precondition to availing themselves of the arbitral forum, the Court held, would "interfere[]" with the FAA's objective of "promot[ing] arbitration." *Concepcion* at 1749-1750.

The contention that *Concepcion* is applicable only in the federal-state preemption context (*see, e.g.*, *Amex III*, 667 F.3d at 212-13 and Judge Pooler's concurrence in the denial of en banc review, *In re American Express Merchants' Litigation*, 681 F.3d 139, 140 (2d Cir. 2012)) is based on a misreading of that decision. *Concepcion*'s interpretation of the FAA would be inapplicable here only if the FAA embodied a more restrictive standard for arbitration of federal claims than for state law claims. That reading is untenable in light of this Court's decision earlier this year in *CompuCredit Corp.* v. *Greenwood*, ____

U.S. ____, 132 S. Ct. 665, at 667 (2012) that the FAA's mandate to "enforce arbitration agreements according to their terms" applies "even when the claims at issue are federal statutory claims." 132 S. Ct. 665, at 667, 669.

Amici submit that it is immaterial that this case involves federal statutory rights rather than state contractual rights. To be sure, *Concepcion* was a preemption decision because the anti-arbitration rule before the Court was embodied in state law. But this Court's holding rested not on the doctrine of preemption, but squarely on its interpretation of the FAA – that "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

There is nothing in the FAA to indicate that arbitrable federal-law claims are to be held to a different standard than arbitrable state-law claims. The Second Circuit's distinction ignores this Court's holding that the duty to enforce an arbitration agreement "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/AMEX, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-24 (2001) (arbitration not inherently inconsistent with enforcement of federal statutory rights). *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (Credit Repair Organization Act); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct.

2772 (2100) (employment discrimination); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) (Age Discrimination in Employment Act does not preclude arbitration of claims brought under that statute); *see also Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[i]t is by now clear that statutory claims" – including "claims arising under the Sherman Act" – "may be the subject of an arbitration agreement, enforceable pursuant to the terms of the FAA"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

Contrary to the Second Circuit's narrow reading of the decision, *Concepcion* is broadly based on the core purpose of the FAA, and that core purpose should be served wherever the FAA applies. *Concepcion* makes clear that enforcement of a class action waiver is essential to serve the FAA's mandate of preserving party autonomy in the crafting of informal and expeditious procedures for the private resolution of *individual* disputes. *See Concepcion*, 131 S. Ct. 1740, at 1749.

The enforcement of a class action waiver is necessary to fulfill the FAA's mandate wherever that statutory mandate applies. *Concepcion* defeats any substantive challenge to the waiver, be it on a categorical or a case-by-case basis, and

regardless of whether the claim to be arbitrated is based on a state or federal statute.[6]

B. Congress Has Not Excluded Antitrust Or Other Federal Statutory Claims From the Application of the FAA

Congress may exclude federal claims from the arbitrability mandate in the FAA. But this Court has repeatedly held that "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors*, 473 U.S. at 628. Recently, in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 669, this Court has reinforced the message that Congress must explicitly state its intent to override the FAA's mandate that all claims, including federal statutory claims, are within the ambit of arbitration.[7]

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[6] There may be limited "procedural" challenges to a class action waiver that survive *Concepcion*. *See Concepcion*, 131 S. Ct. at 1750 n.6 (". . . States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.").

[7] Neither plaintiffs below nor the Second Circuit relied on such a congressional determination: "Plaintiffs

(continued...)

Nothing in the FAA or the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, exempts antitrust claims from arbitration agreements. *See Mitsubishi Motors*, 473 U.S. 614 at 628, 632 (holding in antitrust case).

The Second Circuit nevertheless concluded that "Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict [*sic*] with congressional purposes manifested in the provision of a private right of action in the statute." *Amex III*, 667 F.3d at 220. This Court rejected that contention in *Mitsubishi Motors*, explaining that "the fundamental importance . . . of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634.[8] Further, in *Gilmer*, this Court rejected the argument that

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[7](...continued)
here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions," *Amex III*, 667 F.3d at 220.

[8] Plaintiffs did not argue to the contrary below. *In re Am. Express Merch. Litig.*, 667 F.3d at 213 ("Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions. . . ."

the unavailability of class procedures is a valid basis for refusing to compel arbitration of a federal claim. As this Court explained, "the fact that the [federal statute on which the claim is based] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32 (internal quotation marks omitted).[9]

C. The Second Circuit's "Economic Feasibility" Rationale Has Been Rejected by This Court

As it had in *Amex II*, in *Amex III* the panel found that a class-waiver provision in an arbitration agreement is unenforceable if "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Amex III*, 667 F.3d at 218. In *Amex III* the Second Circuit interprets *Concepcion* as deciding only that California's doctrine of unconscionability was not preserved by the FAA's savings clause as "grounds as exist at law or in equity for the revocation of

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[9] The argument for requiring class procedures was stronger in *Gilmer* than it is here, because the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) ("ADEA"), expressly provides for collective actions. Nevertheless, this Court held that ADEA claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." 500 U.S. at 32 (internal quotation marks omitted).

any contract," 9 U.S.C. § 2.[10] It then invalidates the Amex arbitration agreement based on an almost identical type of "unconscionability" because the underlying claim was grounded in federal antitrust law. *Amex III*, 667 F.3d at 213.

The Second Circuit interpreted language from this Court's decision in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000), as authorizing lower courts to invalidate a class action waiver based on the "prohibitively expensive costs" of proving a federal statutory claim on an individual basis, as opposed to a classwide basis: "[When] a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Amex III*, 667 F.3d at 210, quoting *Green Tree*, 531 U.S. at 92).

The Second Circuit is wrong for at least two reasons.

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[10] The saving clause in section 2 of the FAA permits arbitration agreements to be invalidated by "generally applicable contract defenses," but does not permit such agreements to be negated by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Concepcion* at 1742-43. *Amex III* seeks to evade the clear language and import of *Concepcion*.

1. The Second Circuit's Reliance on Dicta Is Not Persuasive

Despite the governing authority of *Concepcion*, the Second Circuit panel reaffirmed its prior conclusion that the arbitration agreement here is "unenforceable" because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive." *Amex III*, 667 F. 3d at 218, relying, in the panel's own words, on "dicta" in *Mitsubishi Motors* (667 F.3d at 214) and *Green Tree* (667 F.3d at 216). In *Green Tree*, this Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." 531 U.S. 79, 90 (2000), but *Green Tree* explicitly declined to address whether the arbitration agreement was unenforceable because of a class action waiver in the agreement, *see* 531 U.S. at 92 n.7.

2. The Types of Costs Considered as Prohibitive by The Second Circuit Were Not Contemplated in *Green Tree*

The Court in *Green Tree* was specifically concerned with the costs and fees incurred in electing to arbitrate, not with attorney's fees, expert witness fees, or discovery expenses. *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 82 (2000). *Green Tree*, if properly understood, and if it is to have any continuing applicability after *Concepcion*, should be confined to circumstances in

which a plaintiff can show that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent that party from vindicating its rights. *Green Tree* does not apply where the prohibitively expensive costs are imposed, not by arbitration-specific expenses, but by the nature of the claim. The high costs of experts in antitrust or other complex cases are the result of the nature of the claim and the necessary proof, not by using the arbitration process or forum.

In this case, the plaintiffs did not contend, and the Second Circuit did not conclude, that the cost of access to the arbitral forum is "prohibitively expensive" when compared to the costs of bringing a case in court. Rather, the Second Circuit simply assumed, erroneously, that the "vindication" principle identified in *Green Tree* applies to cases in which the cost of proving the claim – whether in court or in arbitration – is high in relation to its value.[11]

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[11] Plaintiffs' expert's affidavit addressed, and the Second Circuit discussed, only the cost of expert evidence at an arbitration on the merits. *See* 667 F.3d at 218, quoting that expert as writing "In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff. . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1

(continued...)

Plaintiffs do not challenge the cost of filing an arbitration claim, or the cost of paying the arbitrator(s). Rather, they argue, as did the plaintiffs in *Concepcion*, that they will be unable to afford the costs of proving their claims (particularly the payment of expert fees), because they cannot spread them among the numerous class members.[12] This challenge, rejected in *Concepcion*, does not satisfy *Green Tree's* "prohibitive cost" rationale.

The Second Circuit's interpretation of *Green Tree* directly conflicts with the *Concepcion* majority's rejection of the dissent's argument that class procedures must remain available because some claims are too small to be worth pursuing on an individual basis. 131 S. Ct at 1753. The

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[11](...continued)
million."

[12] In fact, it is not really a question of allocating, *pro rata* or *per capita*, such expenses. It is usually a matter of the attorneys being willing to bet on a large enough recovery – and hence a large enough fee – to make the expenditure of large expert fees economically prudent. Justice Breyer's dissent in *Concepcion* focused on this question of economic incentives. Even if a claimant were guaranteed to be made whole, few people would bother bringing claims for insignificant sums and no "rational lawyer"would represent them absent class proceedings. *Concepcion*, 131 S. Ct. at 1760-61 That policy rationale, replied the majority, could not undermine the FAA. *Id.* at 1753.

Concepcion dissent contended that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." *See* 131 S. Ct. at 1760 (Breyer, J., dissenting) and "nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds," 131 S. Ct. at 1761. The *Concepcion* majority made it clear that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753 (majority opinion); *see also Stolt-Nielsen*, 130 S. Ct. at 1770 n.7.

D. The "Vindication of Rights" Rationale Has Been Rejected by This Court

The Second Circuit panel held that an agreement to arbitrate on an individual basis is invalid whenever "the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." *Amex II*, 634 F.3d 187, 199; see *also Amex I*, 554 F.3d at 304, *Amex III*, 667 F.3d 204, 212. According to the panel, this factual showing is case-specific – the enforceability of an arbitration agreement "must be considered on its own merits, based on its own record." 667 F.3d at 219. Relying on the affidavit of a single expert witness, the panel concluded that "the only economically feasible means for plaintiffs

enforcing their statutory rights is via a class action." *Id.* at 218.

This "vindication of statutory rights" theory is, of course, precisely the argument that this Court expressly rejected in *Concepcion* – holding irrelevant the dissent's "claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753.

The interference with the FAA is no less pronounced when a plaintiff contends that the inability to "vindicate" a federal claim (as opposed to "vindicate" a claim under state law) mandates the availability of class proceedings. In that situation, as well, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. 1740, at 1748.

The "vindication-of-federal-statutory-rights" argument imposes increased burdens and costs on the party seeking enforcement of an arbitration agreement. That party must introduce expert evidence showing that individual arbitration is an "economically feasible means for enforcing [the plaintiffs'] statutory rights" (667 F.3d 204, 212; 634 F.3d 187, 198) and rebutting the other side's expert evidence, in light of the Second Circuit's repeated emphasis on petitioners' failure to provide facts controverting plaintiffs' expert's affidavit, *Amex I*, 554 F.3d at 319 , *Amex II*, 634 F.3d

187, 199, *Amex III*, 667 F.3d 204, 218. This would, of course, increase the costs of arbitration, dilute the efficiencies the FAA was designed to achieve, and increase the burdens on the courts.

Amex III can be used to challenge virtually every arbitration agreement that contains a class-action waiver. While it purports to take a case-specific approach, its wording is very broad:

> We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

Amex III, 667 F.3d at 214. The panel in *Amex III* cites no relevant cases to support these statements; the "Supreme Court precedent" cited by the Second Circuit are cases in which the issue of arbitration did not arise.

E. The Second Circuit's Decision Is in Conflict with Important Congressional Objectives and This Court's Precedents

The public policy rationale which the Second Circuit invents in *Amex III* – that large costs for proving a claim in an arbitration might prevent a plaintiff from "effectively vindicating" a statutory

right – runs counter to the FAA's direct and clear expression of paramount public policy, and swallows the rule established in *Concepcion* that the FAA does not allow courts to invalidate class action waivers even if "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Concepcion* at 1753. The theory on which the Second Circuit relies to distinguish *Concepcion* and to create an exception to the FAA could result in a proliferation of class actions.[13]

Amici submit that *Amex III* negates an otherwise valid arbitration agreement by conjuring up defenses that apply only to arbitration or derive

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[13] This Court recently cautioned that certain class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 143 (1996); *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006) ("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.") The same pressure to settle would obtain if class-wide arbitration were imposed.

their meaning from the fact that an agreement to arbitrate is at issue, contrary to the savings clause of the FAA. *See Concepcion* at 1742-43.

The Second Circuit's obdurate consistency in holding the contractual class action waiver unenforceable, and thus denying Petitioners their contractual right to arbitration – despite previous remands in light of important recent decisions of this Court – is precisely the sort of expression of continuing "judicial hostility towards arbitration . . . manifested in a great variety of devices and formulas declaring arbitration against public policy" that prompted Congress to enact the FAA. *See Concepcion* at 1747 (internal quotation marks and citations omitted); *see also Nitro-Lift Technologies*, No. 11-1377, *supra*, slip. op. at 5.

The result the Second Circuit seems determined to achieve is to compel a party to forego several of the principal benefits of arbitration, to wit, the choice of arbitration parties, the choice of issues to arbitrate, and a streamlined – and generally less expensive – process.[14]

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[14] As this Court noted in *Concepcion*, "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Concepcion* at 1750, citing *Stolt-Nielsen* at 1776. "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult." (continued...)

Amex III creates a "Catch 22" – either an arbitration agreement must omit a class-action or

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[14](...continued)
Concepcion at 1750. Arbitrators chosen for their subject-matter expertise are not usually familiar with the complex procedural aspects of class certification. *Concepcion* at 1750-51.

As this Court explained further in *Concepcion*,

> Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced...."

Concepcion, 131 S. Ct. at 1752.

class-arbitration waiver,[15] or, if the arbitration contract includes such a waiver, a court will nullify the waiver (and perhaps the arbitration agreement *in toto*) and the parties will be compelled to litigate a class action in court, rather than arbitrate an otherwise manageable dispute. *Amex III*, if not reversed, would negate the overarching purpose of the FAA which is to "facilitate streamlined proceedings" and to "ensure the enforcement of arbitration agreements according to their terms." *Concepcion* at 1748 (citation omitted); *see also Stolt-Nielsen* at 1763.

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[15] As this Court noted in *Concepcion* "[I]t [is] hard to believe that defendants would bet the company with no effective means of review [of an arbitral award], and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Concepcion* at 1752. We see no principled reason why federal courts should be able to do so.

CONCLUSION

Reversal of the Second Circuit's decision is necessary because *Amex III* creates an exception that swallows the rule established by the FAA and this Court's recent teaching on the enforceability of arbitration agreements.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF COSAL—THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Committee to Support the Antitrust Laws (COSAL) was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. It is headquartered in Washington, D.C. and is dedicated to advocating strong antitrust laws and effective private enforcement.[1]

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[1] This brief was not authored in whole or in part by counsel for any party. No counsel for any parties made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution. Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court.

STATEMENT OF FACTS

The salient facts are that the cases are brought by twelve plaintiffs--eleven merchants and the National Supermarkets Association (Respondents or Plaintiffs)--seeking certification under Fed. R. Civ. P. 23(b) to represent a class of all merchants using the cards of Petitioners American Express Company and American Express Travel Related Services (AMEX or Petitioners) and alleging a tying arrangement that they say coerces them into accepting AMEX cards they do not want in order to obtain the ability to accept AMEX's commercially desirable charge cards. The complaint invokes Sherman Act Section 1, seeking injunctive relief under Clayton Act Section 16 and damages under Clayton Act Section 4. Plaintiffs contend that the AMEX "Honor All Cards" rule damaged all merchants in the same way.

AMEX will not provide merchants with an opportunity to accept any of its cards unless they sign what this Court has referred to in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995), as a "standard-form" agreement pledging to arbitrate all claims against AMEX through the American Arbitration Association ("AAA"), the National Arbitration Forum ("NAF"), JAMS or another arbitration forum and agreeing not to seek class relief in arbitration or in court. If a merchant enters into arbitration with AMEX, AMEX demands that "all testimony, filings, documents and any

information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Pet. App. 92a.

SUMMARY OF ARGUMENT

This appeal turns on only two questions: One, is there a Supreme Court-created doctrine that plaintiffs may not be required to arbitrate when the arbitration would not allow full vindication of federally-created rights? Two, did the court below apply the doctrine correctly?

The doctrine that arbitration clauses precluding effective vindication of federal rights are unenforceable, having been restated on numerous occasions by this Court, certainly does exist, and has had a robust existence in the lower federal courts' evaluations of antitrust, labor and civil rights matters, to necessary effect. The Petitioners do not deny any of this. The court below correctly applied the doctrine, based on credible evidence of record that was never refuted.

Public information clearly demonstrates that arbitration for firms seeking to adjudicate long, complex cases like antitrust damage actions is always too expensive for all but a few litigants.

Vindication of litigants' federal statutory rights, in cases where there are numerous putative class members, cannot be achieved in arbitration, due to a multitude of obstacles, aside from prohibitive cost, including lack of tolling and notification.

The twin goals of the antitrust laws—compensation and deterrence—can be achieved only

in a forum where all victims of widespread antitrust violations can be made whole.

ARGUMENT

I. This Court Created and Affirmed the Vindication of Statutory Rights Test in Multiple Opinions, and Made Clear that It Applied to any Constraints on a Litigant's Ability to Vindicate Its Rights

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985), this Court listed circumstances under which an arbitration requirement would be unenforceable, including "a showing . . . that the agreement was '[a]ffected by fraud, undue influence, or overweening bargaining power'; that 'enforcement would be unreasonable and unjust'; or that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.'" *Id.* at 633 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)).

For an arbitration clause to be enforceable "the prospective litigant [must be able to] effectively [] vindicate its statutory cause of action in the arbitral forum, [such that] the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637. This rule was not limited to certain types of constraints, such as choice-of-law constraints, but instead, as demonstrated by its applications in later opinions of this Court, was meant to apply to any arbitral constraint that prevented any litigants entitled to recovery under a

statute from attaining that recovery. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi*, 473 U.S., at 637).

Finally, in *Randolph v. Green Tree Fin. Corp.-Alabama*, 531 U.S. 79 (2000), this Court confirmed that the vindication of statutory rights doctrine applied when there were practical constraints on the litigant's ability to vindicate his or her statutory rights. This Court stated that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Id* at 90.

II. Numerous Lower Courts Have Applied the Vindication Doctrine as the Second Circuit Did Below and Have not Limited Its Application to Costs Unique to Arbitration

The *Green Tree* court identified the costs that should be considered in the vindication analysis as costs the plaintiff "will bear" "if she goes to arbitration." *Id.* at 90. This Court then stated that "where, as here, a party seeks to invalidate an arbitration agreement on the ground *that arbitration would be prohibitively expensive*, that party bears the burden of showing the likelihood of incurring

such costs." *Id.* at 92. (emphasis added). The *Green Tree* court mandated that a party asserting that it cannot vindicate its statutory rights must demonstrate that the case would be too costly to arbitrate. That is how this edict has been applied by lower courts.

For example, in *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006), the court stated that:

> The class mechanism ban—"particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements"—forces the putative class member "to assume financial burdens so prohibitive as to deter the bringing of claims.... And these costs ... will exceed the value of the recovery she is seeking."

Kristian, 446 F.3d at 54-55 (quoting Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 407 (2005)). The court acknowledged that all of the above expenses, such as expert fees and deposition fees, which each class member would have to bear, were "arbitration costs." *Id.* at 55. The court also recognized that the vindication doctrine can be applied to procedural obstacles to enforcement of substantive rights: "[w]hile Comcast is correct when it categorizes the class action (and class arbitration) as a procedure for redressing claims—and not a

substantive or statutory right in and of itself—we cannot ignore the substantive implications of this procedural mechanism." The *Kristian* court thus determined "[i]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law." *Id.* at 61.

A number of other lower courts have applied the vindication of statutory rights doctrine to determine whether the costs that putative plaintiffs would have to bear in the event that their cases were channeled to arbitration would prohibit them from effectively pursuing the statutory remedies to which they were entitled.

In *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001), the court stated that in a vindication analysis a court should look at " . . . the expected cost differential between arbitration and litigation in court . . ." and "whether that cost differential is so substantial as to deter the bringing of claims," among other factors.

The court in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003) repeated the test set forth in *Bradford,* and added that: "[t]he issue is not only whether an individual claimant would be precluded from effectively vindicating his or her rights in an arbitral forum by the risk of incurring substantial costs, but also *whether other similarly*

situated individuals would be deterred by those risks as well." (emphasis added).

It explained that:

> In many, if not most, cases, employees (and former employees) bringing discrimination claims will be represented by attorneys on a contingency-fee basis. Thus, many litigants will face minimal costs in the judicial forum, as the attorney will cover most of the fees of litigation and advance the expenses incurred in discovery.

Morrison, 317 F.3d at 660. The court thus concluded that "[t]he issue is not the fact that the fees would be paid to the arbitrator, but rather whether the overall cost of arbitration, from the perspective of the potential litigant, is greater than the cost of litigation in court." *Id.* at 664 (internal citations omitted); *See also In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.")

III. The Vindication Test Was Properly Applied By The Second Circuit to Invalidate the AMEX Arbitration Requirement Given that Bilateral Arbitration Could not Provide a Way for All Class Members to Vindicate their Statutory Rights

The Second Circuit took note of *Green Tree*'s assertion "that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." Pet. App. 22a (quoting *Green Tree*, 531 U.S. at 90). The court below then applied this Court's rule, also set forth in *Green Tree*, that when a "party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." (quoting *In Re American Express Merchants' Litigation*, 634 F.3d 187, 197 (2d Cir. 2011)) Pet. App. 49a (quoting *Green Tree*, 531 U.S. at 92)).

Applying this test to the evidence submitted by Plaintiffs, the court evaluated a declaration by Plaintiffs' economic expert who stated that his prices charged for expert assistance in antitrust cases ranged from $300,000 to $2,000,000 and that the cost of his work in this case would likely fall somewhere in the middle of that range. Pet. App. 26a. The court also took into account Plaintiffs' expert's statement that the median recovery of a medium volume merchant, trebled, would be $5,252, and that it would

not be worthwhile for an individual plaintiff to pursue an action for such damages, when the out-of-pocket costs, just for economist fees, would be at least several hundred thousand dollars or as much as $1 million. *Id*

The court also took into account "Supreme Court precedent [that] recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action." It stated that "[t]he Court made the point forcefully more than thirty years ago in the context of an antitrust action," and quoted this Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974):

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would under-take this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen, 417 U.S. at 161.

The court below also looked to this Court's opinion in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997), stating: "As the Court later opined, '[t]he policy at the very core of the class action

mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting *Amchem Prods.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In light of Plaintiffs' showing, the court below held that the AMEX arbitration agreement precluded the Plaintiffs from vindicating their federal statutory rights under the antitrust laws. Pet. App. 29a.

Just like the other courts applying the vindication rule, the court below measured the cost of arbitration, which would be the cost of each plaintiff proceeding separately and each bearing the expert costs of $300,000 to $2,000,000, in comparison to the cost of litigation, which would allow all plaintiffs to share the costs. The court then compared the cost of arbitration to the likely amount each plaintiff could recover in such a proceeding to determine that the cost of arbitration precluded the plaintiffs from vindicating their statutory rights due to the cost of arbitration being prohibitively high and the plaintiffs' lack of economic motivation to pursue their cases on an individual basis.

IV. Public Information Shows That Arbitration Costs Would Be Prohibitive For The Putative Class Members

The AMEX brief speaks of arbitration as being simple and economical for plaintiffs with small claims. Pet. Br., at 50-51. It recites some JAMS and AAA prices for consumers. However, this case is brought by retailers, not consumers. The largest claim asserted by any of the Plaintiffs is approximately $40,000. Retailers such as the Respondents would normally engage in arbitration governed by the rules of *commercial* arbitration.

AAA's Standard Administrative filing fees for commercial matters are over $1,000.[2] The majority of these fees has to be paid up front, when a party first files its claim. *Id.* There are also "deficient filing fees" assessed on "[p]arties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements" and "[t]he AAA may assess additional fees where procedures or services outside the Rules sections are required." *Id.* Also, if the case requires three or more arbitrators, the minimum filing fees total over $4,000. *Id.*

If arbitrating with AAA, each plaintiff would likely have to pay $500 to $800 per hour for the

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[2] See *http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004102*

services of the arbitrator. *See In re A2P SMS Antitrust Litig.*, Master File 12-cv-2656 (AJN), Declaration of George A. Bermann Regarding Arbitration Issues, ¶28 (Dec. 10, 2012). An antitrust arbitration can last up to 640 hours, if three arbitrators are used and up to 204 hours, if one arbitrator is used. *Id.* at ¶39. Absent Rule 23 procedures, each victim of AMEX's violation would have to file its own arbitration claim, and pay the above fees, without ever having the possibility of sharing expenses.

A piece in the New York Bar Journal made the following statement, in regard to an arrangement such as the one at issue here:

> When a commercial agreement containing an arbitration clause is negotiated, often it is by non-litigators unfamiliar with the arbitration process. Parties who agree to arbitrate before a panel of arbitrators of the AAA, JAMS Resolution Centers (JAMS), The American Health Lawyers Association (AHLA), the International Chamber of Commerce (ICC) or a myriad of others, are unlikely to contemplate that the out-of-pocket outlay can, within a short period of time, easily *reach six figures and be subject to reallocation to impose payment of the entire fee on the losing party.*

Ronald J. Offenkrantz, *Arbitrating Commercial Issues, Do You Really Know the Out-of-Pocket Cost?*, 18 N.Y.ST.B.J. 30, 31 (2009) (emphasis added).

The piece offers some examples of prices for commercial arbitration:

> Would counsel or a client anticipate, before agreeing to arbitrate or filing an arbitration demand, that arbitral fees of three arbitrators for a shareholders' dispute calling for seven days of hearings under the AAA Rules would total $80,000? What of a joint venture/licensing dispute resulting in arbitrators' fees of $468,000, or a trademark license dispute requiring seven days of hearings totaling $124,000 in arbitrator fees, or an employer/employee dispute in which the three arbitrators awarded fees, sanctions and costs of over $300,000? And what of the disputes where arbitrator fees alone can total $500,000 or more?

Id.

Like the administrative fees, a portion of the arbitrator fees also have to be paid in advance and must be replenished if they run low. *Id.* A party's inability to pay its share of fees can result in it being p[illegible]judiced in the arbitration. *Id.* at 32 (citing *Coty Inc. v. Anchor Constr. Inc.*, 7 A.D.3d 438, 776 N.Y.S.2d 795 (1st Dep't 2004), *aff'g* No. 601499-02,

2003 WL 139551 (Sup. Ct., N.Y. Co. Jan. 8, 2003) (party excluded from two days of hearing due to inability to advance arbitrator fees)). Unlike in most litigation, costs, as well as fees, are often imposed on the losing party in an arbitration. *In re A2P SMS Antitrust Litig.*, Master File 12-cv-2656 (AJN), Declaration of George A. Bermann Regarding Arbitration Issues, ¶41. Such relief for a winning defendant could expose some antitrust plaintiffs, especially small businesses such as the Respondents, to bankruptcy or "bet the company" risks.

The above fees for arbitration are added to the expert fees needed for a damage calculation, to determine the entire cost of arbitration. Petitioners appear, at 10, to question the reliability of Plaintiffs' expert estimate. There is ample evidence available from public sources showing that the expert's estimate here is similar to fees quoted by other experts. *Kristian*, 446 F.3d at 58 (plaintiffs' economist submitted an affidavit declaring that his expert fees would be "a minimum of $300,000, which could exceed in excess of $600,000 depending on the implementation of the factual inquiry").

The brief of the New England Legal Foundation, at 21, suggests that Plaintiffs could organize to share expert witness costs. But this hardly works for

millions of plaintiffs[3] who do not know each others' wishes or even addresses and have to maintain confidentiality of all information obtained in arbitration.

V. In an Antitrust Suit with a Large Number of Putative Plaintiffs, A Number of Factors Aside from High Costs Preclude Vindication from Being Achieved without a Class Mechanism

In *Mitsubishi*, this Court held that arbitration can be enforced "so long as the litigant effectively may vindicate the statutory cause of action in the arbitral forum." When a Rule 23(b) antitrust damage class action is filed, the putative litigant is the class, not any one member of it.

In one-on-one cases, the issue is whether the plaintiff can vindicate his right adequately in an arbitral forum. In cases like this, an antitrust class action on behalf of millions of purchasers, the question is whether arbitral fora can allow for vindication of the rights of all or most of them; as described in *Morrison*, where the Sixth Circuit stated that what matters is whether a provision in an

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[3] As stated in the complaint filed by the Department of Justice against American Express, concerning the same conduct at issue here, "[i]n 2009, American Express was accepted at 4.9 million merchant locations within the U.S. . . ." *United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y.), Complaint, ¶64.

arbitration agreement "would deter a substantial number of similarly situated potential litigants." *Morrison*, 317 F.3d at 663. Even if the answer to the first question is "maybe," the answer to the second question is always "no!" Only class actions can remedy nationwide antitrust cartels and monopolies.

The First Circuit has recognized that a litigant's ability to vindicate its federal rights is not limited to having the ability to pay the costs of the adjudication, but also includes other considerations. In *Kristian*, the court held that, if a ban on treble damages were enforceable, it would prevent the plaintiffs from vindicating their federal rights under the federal antitrust laws. *Kristian*, 446 F.3d at 48.

Here, there are myriad reasons why *seriatim* or even concurrent arbitrations are utterly impractical for handling antitrust cases with numerous plaintiffs. To start with, the average antitrust case lasts about six years, even without trial.[4] Once the first plaintiff begins arbitration, all the others may have to wait six years before they can benefit from the outcome of that arbitration and take advantage of

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[4] Daniel Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 692 (2010) ("[T]he average private antitrust lawsuit today takes over six years to disposition" and "[t]he Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.")

any preclusive effects it may have. However, even waiting for the completion of one arbitration will not aid future plaintiffs in pursuing a subsequent arbitration, as arbitration settlements and rulings can be confidential, as required by AMEX's arbitration rules. Even if the arbitrators' rulings were able to be used by subsequent plaintiffs and constituted grounds for collateral estoppel, the other victims would still have to initiate their own arbitrations, and pay their own filing and arbitrator fees, as well as potential expert fees, before they could take advantage of any collateral estoppel. Furthermore, the first arbitration will likely not toll the statute of limitations for subsequent plaintiffs, as a class action litigation would do for putative class members. Under the four-year statute of limitations dictated by the Clayton Act, many may lose their claims, while awaiting the outcome of the first arbitration or simply due to not finding out that they have been injured.

If numerous cases go forward at once, then numerous sets of plaintiffs' lawyers and experts have to separately, repetitively and wastefully perform work that could be done by one team in a class action. And, as set forth above, arbitrators, unlike judges, do not work for free. They must be paid for equally by each single plaintiff.

Furthermore, none of the arbitral forums specifically referred to in AMEX's arbitration

clause—AAA, JAMS or NAF—can allow an individual plaintiff to obtain, or order the defendant to produce, the names and addresses of class members, notify them of settlements or outcomes, create claim forums, distribute money under a formula or conduct any of the other procedures available in class antitrust damage litigation for the compensation of the parties injured by illegal anticompetitive conduct.

In an antitrust case like this one with millions of victims all injured in the same way, district court class action litigation allows one recovery at one time for all victims wishing to join the action or accept its consequences, efficiently distributed by one administrator. This achieves judicial economy and deterrence based on the full effect of the violation. In contrast, if there is an antitrust violation with a hundred similarly-affected victims and single plaintiff arbitration is imposed due to take-it-or-leave-it form agreements (all true in this case), the victims who do not arbitrate individually would be left, at best, with questionable alternatives, and most likely with no recovery at all. And victims who do not even know that they have a claim against a defendant will never be notified of said claim as they would be in a class action. Thus, the named plaintiffs in any given class action may be the only plaintiffs who benefit from arbitration. Nor can a defendant engaging in arbitration obtain global peace from one settlement, but must instead engage in separate

proceedings with each plaintiff whose claim it wishes to resolve.

One of the opinions dissenting from the denial of rehearing *en banc* concentrates on whether the antitrust laws provide sufficient incentives to induce a plaintiff to arbitrate and for an attorney to take his case. Pet App. 137a-138a. The evidence was that they do not and it is not the purpose of Supreme Court review to second guess such weighing of facts.

VI. Prohibiting Class Actions in Situations Where Numerous Plaintiffs Have been Injured by a Widespread Antitrust Violation Will Preclude Achievement of the Antitrust Laws' Goals of Compensation and Deterrence

The question presented here could not be clearer: It is whether firms that commit antitrust violations (including felonies) against millions of victims should be able to insulate themselves from most damage liability by selling their goods only on the condition that any antitrust damage case against them must be conducted in bilateral, one-by-one arbitration. Unless this Court intends to eviscerate the entire compensation and deterrence system provided by antitrust damage actions, the answer must be no. That is what the Second Circuit held here, enforcing a rule restated by this Court in a number of cases and embraced in almost all circuits.

So long as this Court will enforce class action waivers in arbitration clauses and deny class

treatment under all arbitration clauses not expressly providing for it, the damage purposes of the antitrust laws can never be vindicated if arbitration is ordered against every plaintiff seeking to represent a putative class of victims meeting the numerosity requirements and common impact standards of Rule 23(b).

"Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). "[T]he private cause of action plays a central role in enforcing this regime." *Mitsubishi*, 473 U.S. 635 (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972)). "'A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.'" *Mitsubishi*, 473 U.S. at 635 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 168 (1st Cir 1983) (quoting *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)). "The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial

deterrent to potential violators." *Mitsubishi*, 473 U.S. at 635 (citing *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-139 (1968)).

The purposes of the antitrust laws are "to deter[] violators and depriv[e][] them of 'the fruits of their illegality,'" *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968)), as well as "to compensate victims of antitrust violations for their injuries." *Illinois Brick*, 431 U.S. at 746 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977)).

Unlike claims brought under certain other statutes, federal antitrust claims can only be brought in federal court, to be decided by the jurists most competent to analyze them, and federal antitrust class actions can only be initiated in private actions.

Here, the named plaintiffs are seeking to bring a class action on behalf of millions of putative class members who have been injured by the same anticompetitive practices. These practices are so pernicious that they are being prosecuted by the Department of Justice. A ruling depriving the plaintiffs of their ability to proceed with this class action and obtain recovery for the millions of merchants injured by AM[illegible]'s conduct would also deprive future plaintiffs of the ability to recover damages from admitted conspirators who have

pleaded guilty to engaging in felonies, in violation of the antitrust laws, such as the perpetuators of the TFT-LCD conspiracy.[5]

Compensation of all victims of such widespread conspiracies is necessary to achieve the deterrence objective of the antitrust laws. As a recently-published law review note states:

> [t]he dominant law-and-economics model of crime posits that rational choices drive corporate decisions (including the decisions of the individuals involved) to commit crimes--a "cost/benefit analysis" of the decision. Consequently, there exists a bundle of sanctions that the legal system can (at least in theory) calculate that optimally will deter the crime.

John M. Connor and Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 438 (2012). Such sanctions include government fines and private damages, among other fines. "The standard optimal deterrence formula

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[5] *See In re TFT-LCD (Flat Panel) Antitrust Litig., Direct Purchaser Litigation*, Case no. 3:07-md-01827-SI (N.D. Cal), Order (May 9, 2011) (certain defendants who pleaded guilty to engaging in price-fixing on TFT-LCD products successfully invoked an arbitration clause against non-named plaintiff direct purchasers).

shows that the total amount of cartel sanctions should equal the cartel's "net harm to others" divided by the probability of detection and proof of the violation." *Id.* at 455. Being precluded from having to pay full compensation to its victims will encourage a cartelist to strike again.

Even under the current system, violators of the antitrust laws are under-deterred. The above study found that, out of the 75 cartels evaluated, only two were optimally deterred. *Id.* at 474. Thus, 73 cartels would have economic motivation for recidivism. As demonstrated above, permitting cartel members to avoid paying damages through use of an arbitration clause would promote recidivism of large cartels victimizing individuals and small businesses such as the Respondents.

This Court should not ignore a harsh reality: If price-fixers who overcharged hundreds of buyers are sued in a federal class action, and succeed in getting the federal case dismissed in favor of bilateral arbitrations, the game is over. The price-fixers win, pay almost nothing, and the victims lose, as does the antitrust enforcement system. A ruling like that sought by Petitioners here would not be a change of form or forum, but a death knell for the victims and a triumph for the antitrust violators, guaranteeing that their scheme will be profitable, and making certain that the antitrust statutes will be prevented from serving their "remedial and deterrent function[s]."

See Mitsubishi, 473 U.S. at 637. This is exactly the type of situation in which the *Mitsubishi* court contemplated arbitration clauses being inapplicable.

Just as this Court has been unwilling to transmogrify FAA bilateral arbitration, it should be unwilling to transmogrify a properly certifiable numerous-victim antitrust case into a disconnected short series of bilateral arbitrations of actions belonging to a few of the millions of injured putative class members. The bilateral arbitration contemplated by the FAA was not intended to be, nor can it provide, an effective remedy for numerous victims of a federal antitrust violation.

Arbitration is an excellent path in many non-antitrust fields, and perhaps in one-on-one antitrust disputes between parties operating under a negotiated contract. But the FAA assumes that arbitration is there to be used, not to be set up as an insurmountable obstacle protecting antitrust violators from multiple victims, all of whom had to accede to arbitration as a condition of dealing with the defendant.

VII. Neither AMEX's References to *Concepcion* and *Stolt-Nielsen*, nor its Policy Arguments Militate in Favor of a Different Conclusion

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), this Court's rulings were justified partly by misgivings over the effectiveness or appropriateness of class arbitration. But a potential defendant may provide for one-on-one arbitration as the only form of arbitration in which it will agree to engage, so long as its arbitration agreement provides an exception for federal antitrust or other qualifying federal statute-based suits filed as putative class actions.

Petitioners argue that this Court's ruling in *Concepcion* mandates reversal, at 27. But AMEX misstates that ruling and sets up a straw man. It infers, at 29-31, that the Second Circuit's ruling requires class arbitration. But the court below ordered no such thing. It simply remanded for litigation in district court of a normal antitrust class action complaint.

Concepcion is not controlling in this matter, for three reasons: First, it was a preemption case, and thus says nothing about how to reconcile the goals of two federal statutes. *Concepcion*, 131 S. Ct. at 1753. Second, *Concepcion* found unreasonable a flat prohibition on the denial of class arbitration for cases concerning a vast majority of consumer contracts,

while the Second Circuit in this case found class treatment necessary based on the likely costs of the federal antitrust case in question. *Compare Concepcion*, 131 S. Ct. at 1750 *with* Pet App. 29a. *Concepcion* emphasized the quick and easy arbitration (even by telephone call) offered by AT&T, while no antitrust damage case is ever resolved so quickly or economically. *See Concepcion*, 131 S. Ct. at 1744; 1751. Third, *Concepcion*, involved several consumer claims, such as false advertising, while this matter involves a federal antitrust violation for which AMEX is being prosecuted by the Department of Justice.[6] Further, a finding here that victims of widespread antitrust violations could not proceed in a Fed. R. Civ. P. 23 action against violators would protect defendants guilty of major federal felonies, such as price-fixing, a result that could not have been intended by the drafters of the FAA.

AMEX's "policy" arguments are also ill-founded. It stresses the circumstances that led to the Class Action Fairness Act (CAFA) legislation. That law relates only to cases filed in state courts, and moves them to federal courts, on the ground that federal judges are better trained to determine class certification issues. But all cases under the federal antitrust laws have always been filed in federal court, including this case. The CAFA Report also

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[6] *United States v. Am. Express Co.*, No. 10-cv-4496, *supra*.

points to cases that were believed to have led to excessive or blackmail settlements. S. Rep. No. 14, at 21-22 (2005). Such examples are unavailing here, as they were not antitrust cases.

This court has already taken measures and announced rules regarding pleading standards, summary judgment standards, standing and class actions, to control antitrust and class actions that may lack a sufficient basis or are too burdensome to litigate. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co.*, 431 U.S. 720.

Ironically, direct purchasers, who the Supreme Court has stated have standing to challenge antitrust violations under the federal antitrust laws, would be the ones deterred from vindicating their rights under a ruling upholding arbitration clauses in situations such as this one.

What the AMEX policy argument avoids discussing is the effect that its proposed prohibition on access to the federal court system will have on major, well-founded antitrust cases, such as cases seeking restitution for victims of international price-fixing cartels. There, as often happens, the Justice

Department learns of a major cartel due to a leniency applicant. It files indictments, secures guilty pleas and sends executives to prison. Federal class actions follow, pursuant to which thousands of victims receive compensation. There is no way for AMEX to describe such cases as blackmail. But there is no way for this Court to reverse the holding below and not create a rule allowing international price-fixers to protect themselves from many damage claims simply by inserting an AMEX-type clause in their sales contracts.

CONCLUSION

This Court should fashion a rule that preserves the deterrence and compensation functions of the antitrust laws by permitting numerous plaintiffs injured by antitrust violations to recover their damages, and affirm the ruling below.

Respectfully submitted,

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January 29, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are distinguished professors of law from several leading law schools across the country ("*Amici* Law Professors"). *Amici* Law Professors have lectured and written extensively on issues of contract law and arbitration. They support the enforcement of arbitration clauses as written and thus the Federal Arbitration Act's central mandate requiring the enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 3; *id.* § 4. *Amici* Law Professors oppose the Second Circuit's refusal to enforce the arbitration agreement at issue in this case, *see In re American Express Merchants' Litig.*, 667 F.3d 204 (2d. Cir. 2012) ("*Amex III*"), and believe that the Second Circuit's expansion of the "vindication of statutory rights" theory is simply a new manifestation of judicial hostility toward agreements to arbitrate that is inconsistent with the Federal Arbitration Act.

Amici Law Professors include:

Henry N. Butler, George Mason University Foundation Professor of Law and Executive Director of the Law & Economics Center at the George Mason University School of Law;

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Richard Epstein, Laurence A. Tisch Professor of Law at New York University School of Law, Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, and James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer at the University of Chicago;

M. Todd Henderson, Professor of Law and Aaron Director Teaching Scholar at the University of Chicago Law School;

Michael I. Krauss, Professor of Law at George Mason University School of Law;

Geoffrey A. Manne, Lecturer in Law at Lewis & Clark Law School and Executive Director of the International Center for Law & Economics;

Michael P. Moreland, Vice Dean and Professor of Law at Villanova University School of Law; and

Todd Zywicki, George Mason University Foundation Professor of Law at George Mason University School of Law.

SUMMARY OF THE ARGUMENT

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 to "revers[e] centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974); *see also Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The FAA's primary "purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' H.R. Rep. No. 96, 68th Cong., 1st Sess.,

1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

Section 2 of the FAA is its cornerstone. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). It guarantees that arbitration agreements will be "valid, irrevocable, and enforceable" as a matter of federal law except where state law grounds exist "for the revocation of any contract." 9 U.S.C. § 2.

To effectuate this guarantee, the FAA's central mandate requires the enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 3; *id.* § 4. This central mandate "requires courts to enforce agreements to arbitrate according to their terms, ... even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal citation omitted); *see also Shearson/ American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.").

Notwithstanding this strict federal mandate, the Court has suggested that it may decline to enforce an arbitration agreement where "the existence of large arbitration costs" preclude a claimant "from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). As outlined in *Randolph*, this "vindication" theory is a narrow exception to the central mandate of the FAA; it requires the party opposing

arbitration to prove that costs *unique to arbitration* are so high as to foreclose *access* to the arbitral forum. *Id.* at 90-91.

The Second Circuit panel, however, "distort[ed]" *Randolph*, wildly expanding its "vindication" theory by ignoring both of its defining features. *In re American Express Merchants' Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) ("*Amex* Order Denying Rehearing *En Banc*") (Jacobs, C.J., dissenting from denial of rehearing *en banc*). First, the panel considered not the costs of *arbitration*, but putative *litigation* expenses, including purported million-dollar expert witness fees. *See Amex III*, 667 F.3d at 218. Setting aside whether such exorbitant expert fees would be incurred in arbitration in the first place, they clearly are not connected to arbitration itself. That such costs would exist in litigation necessarily means that they cannot be considered to preclude access to the arbitral forum.

Moreover, it is nonsensical for a court to assume that the arbitral forum would require million-dollar procedures to resolve claims of a much smaller magnitude, given that the entire point of contracting for arbitration is to obtain "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-281 (1995). Indeed, it is not for the court to decide what procedures should be employed in arbitration in the first place. This is the job of the arbitrator. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

Second, and perhaps more importantly, the panel nullified the arbitration agreement at issue because it does not permit class procedures which, in the court's estimation, are the "only economically feasible means"

for plaintiffs to press their antitrust claims. *Amex III*, 667 F.3d at 218. In so doing, the panel improperly focused on whether an individual plaintiff would have sufficient financial *incentive* to bring its claim in the arbitral forum in the manner provided for in the arbitration agreement. But financial *incentives* do not bear on access, that is, whether the doors to the arbitral forum are open to a particular claimant in the first place. Moreover, employing an incentive rationale to determine whether class procedures are necessary to vindicate a plaintiff's claim is foreclosed by the Court's recent decision in *AT&T Mobility LLC v. Concepcion*, which bars courts from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744.

Given that it runs contrary to the FAA's central mandate as well as this Court's teaching that only Congress—not the courts—may "identify any category of claims as to which agreements to arbitrate will be held unenforceable," *Mitsubishi Motors Corp.*, 473 U.S. at 627, the "vindication" theory should be applied narrowly. The Second Circuit's expansion of this theory cannot be squared with this Court's strict enforcement of arbitration agreements except in the case of a congressional override. Indeed, it risks transforming dicta in *Randolph* into an open-ended judicial inquiry into potential reasons for invalidating an arbitration agreement. If left uncorrected, the decision below would re-open the door to a new brand of "judicial hostility to arbitration agreements," directly counter to the FAA's animating purpose. *Scherk*, 417 U.S. at 510-11. For all these reasons, *Amici* Law Professors agree with Petitioners that "the panel below exceeded its proper role under the FAA." Pet. Br. at 57.

ARGUMENT

I. THE PANEL EXPANDED *RANDOLPH*'S "VINDICATION" THEORY BEYOND RECOGNITION.

A. *Randolph* Outlined A Narrow Exception To The Rule That Arbitration Agreements Must Be Enforced As Written.

In *Randolph*, 531 U.S. 79, the Court considered the enforceability of an agreement to arbitrate entered into between an individual consumer and her lender. Despite having signed a written agreement to arbitrate all disputes arising from or relating to her loan contract, the plaintiff filed a putative class action complaint asserting federal statutory claims against the lender. *Id.* at 82-83. In an attempt to avoid arbitration, she argued that "prohibitive arbitration costs" would force her to forgo her claims rather than arbitrate them, thereby precluding her from "vindicat[ing] her statutory rights in arbitration." *Id.* at 90.

Without actually deciding whether "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum," the Court rejected plaintiff's argument, concluding that the record failed to show that she would "bear such costs if she goes to arbitration." *Id.* Yet the Court made clear that this "vindication" theory employed a limited cost inquiry to determine whether the claimant had been effectively denied access to the arbitral forum.

The Court's cost inquiry focused not on costs borne by a claimant in adjudicating her claim in *any* forum but, rather, only those costs unique to arbitration, *i.e.*, those costs that will be borne "if she pursues her claims in an arbitral forum." 531 U.S. at 90. In particular, the Court highlighted the "filing fees" and the "arbitrator's fee," but not attorney's fees or any other expenses that would be incurred in the course of *litigating* the plaintiff's claims. *Id.* at 90 n.6. Notably, all nine justices were in agreement on this point, as Justice Ginsburg's separate opinion keys on those costs unique to arbitration. Explaining that the Court was addressing "a 'who pays' question," Justice Ginsburg referenced only the "filing fee" and "total fees charged by the arbitrator." *Id.* at 95 (Ginsburg, J., concurring in part and dissenting in part).

Likewise, the opinion for the Court and Justice Ginsburg's separate opinion both made clear that this limited cost inquiry was intended to determine whether the plaintiff could *access* the arbitral forum. The Court articulated the question as whether "prohibitive arbitration costs" would "force[] her to forgo any claims she may have against petitioners." *Id.* at 90. Without any comparison against the size of the plaintiff's claims, it is clear that the Court was concerned with the price of admission, i.e., access to the forum. Justice Ginsburg was even more clear, characterizing the question as whether "the arbitral forum is financially inaccessible" to the plaintiff. *Id.* at 93 (Ginsburg, J.); *see also id.* ("[I]s that forum *accessible* to the party resisting arbitration."); *id.* at 94, 96.

In short, *Randolph* endorses a narrow exception to the FAA's central mandate. A court may decline to enforce an arbitration agreement where a claimant demonstrates

that she would face arbitration costs so exorbitant that they effectively deny her entry to the arbitral forum.

B. The Panel Exceeded The Bounds Of *Randolph*'s "Vindication" Theory.

As explained above, *Randolph* contemplated a narrow exception to the FAA's mandate that the courts must enforcement arbitration agreements as written. In refusing to enforce the arbitration agreement at issue here, the panel distorted *Randolph*'s vindication theory in two key respects.

First, ignoring *Randolph*'s focus on "arbitration costs," the court nullified the arbitration agreement at issue on the basis of putative *litigation* expenses. Rather than addressing the "filing fees" and the "arbitrator's fee," *Randolph*, 531 U.S. at 90 n.6, the panel considered the costs of litigation generally, including "substantial" expert witness costs and attorneys' fees. *Amex III*, 667 F.3d at 218. In so doing, the panel plainly exceeded the bounds of *Randolph*, which concerns only those costs unique to arbitration. Even assuming that Respondents would have to incur "substantial" expert witness costs and attorneys' fees at arbitration, it cannot be said that those costs impact Respondents' ability to access the arbitral forum, given that Respondents certainly would have borne those costs in a judicial forum. Such costs are not unique to arbitration, and the consideration thereof is inappropriate under *Randolph*.

Moreover, it was wrong for the panel to assume that arbitration would require Respondents to employ expert witnesses and incur the level of attorneys' fees typical of complex antitrust *litigation*. Respondents' expert

estimated that an economic study and expert services would cost "'at least several hundred thousand dollars, and might exceed $1 million.'" *Id.* at 218 (internal citation omitted). But it makes no sense to assume that any arbitrator would require a $1 million expert economic study to arbitrate a claim of $5,252 or even $38,549,[2] especially given that the reason why parties contract for bilateral arbitration rather than litigation is "to realize the benefits of private dispute resolution," including "lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *see also Allied-Bruce*, 513 U.S. at 280-281 ("a less expensive alternative to litigation"); H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation."); John W. Cooley & Steven Lubet, Arbitration Advocacy ¶ 1.3.1, at 56 (Nat'l Inst. for Trial Advocacy ed., 1997) ("Arbitration ... is conducted in a less formal and less rigorous setting, thereby enhancing the potential for more expeditious resolution.").

Because the entire point of arbitration is to provide a "cost-effective alternative to litigation,"[3] arbitrators generally tailor the procedures to be employed in

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2. Respondents' expert estimated the damages to be $5,252 for the median-volume named-plaintiff merchant and $38,549 for the largest-volume named-plaintiff merchant. *See Amex III*, 667 F.3d at 218.

3. *See* American Arbitration Association, *Arbitration Services*, http://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration?_afrLoop=52275363419732&_afrWindowMode=0&_afrWindowId=165ijz1y8a_68#%40%3F_afrWindowId%3D165ijz1y8a_68%26_afrLoop%3D52275363419732%26_afrWindowMode%3D0%26_adf.ctrl-state%3D165ijz1y8a_124 (last visited Dec. 28, 2012).

arbitration around the size of the claim. Indeed, organizations that provide arbitration services generally offer multiple options in terms of the levels of procedure to be employed that increase in complexity as the amount of the claim increases.[4] Moreover, administrative fees in arbitration are "based on the amount of the claim or counterclaim"[5] and compensation for arbitrators generally "tak[es] into account ... the size and complexity of the case."[6] It thus is highly unlikely that arbitration of Respondents' claims would have required such elaborate (and expensive) procedures.[7]

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4. *See, e.g.*, JAMS: The Resolution Experts, *Arbitration Practice Overview*, http://www.jamsadr.com/managedarbitration/ (last visited Dec. 28, 2012) ("In order to save clients time and money, JAMS ... allow[s] the crafting of a process that is commensurate with the dispute.").

5. American Arbitration Association, *International Dispute Resolution Procedures*, at 41 (last updated June 1, 2009) http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased.

6. *Id.* at 36. The goal of tying the costs of arbitration to the nature and complexity of the case is sometimes written into the codes of professional responsibility for arbitrators. *See, e.g.*, American Arbitration Association, *Code Of Professional Responsibility For Arbitrators Of Labor-Management Disputes*, at 14 (last updated Sept. 2007) http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003869&revision=latestreleased ("An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.").

7. Put another way, Respondents failed to meet their "burden of showing the likelihood of incurring such costs." *Randolph*, 531 U.S. at 92.

Perhaps worse, it is not for the court to speculate as to the procedures that must be employed in adjudicating a dispute through arbitration. It is the job of the arbitrator, and *not* the court, to determine what procedures are to be employed in arbitration. *See Howsam*, 537 U.S. at 84 ("'[P]rocedural questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964))); *see also Stolt-Nielsen*, 130 S. Ct. at 1775. The panel usurped the role of the arbitrator by assuming that arbitration would require formal expert reports.

Second, and perhaps more importantly, the Second Circuit compounded its error by comparing the total costs of adjudicating the case against the amount of Respondents' potential awards in order to determine whether Respondents would have sufficient economic incentive to bring their claims on an individual basis. Giving effect to the lone expert affidavit that set forth the likely costs of an economic study, the court concluded that it would not be "economic[ally] rational[]" for the plaintiff to bring an individual action "in light of these substantial expert witness costs." *Amex III*, 667 F.3d at 217-18; *accord In re American Express Merchants' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) ("*Amex II*") ("[T]he size of any potential recovery by an individual plaintiff will be too small to justify the expense of bringing an individual action."). This analysis is unsupported by *Randolph*.

As explained above, the theory of *Randolph* is one of *access* to the arbitral forum, not whether the would-be claimant has sufficient economic interest to advance or prevail on his claim in that forum. *See, e.g.*, 531 U.S. at

93 (criticizing the majority for deciding that the party opposing arbitration "bears the burden of demonstrating that the arbitral forum is financially inaccessible to her") (Ginsburg, J.). Whether the costs of adjudicating Respondents' claims exceeds the amount of their claims—that is, whether Respondents have financial incentive to adjudicate their claims—is irrelevant. Indeed, had the relative size of the plaintiff's claim affected the analysis, the *Randolph* Court certainly would have mentioned that fact that the plaintiff characterized her claim as having a "$15 value." Br. of Resp't, *Green Tree Financial Corp.-Ala. v. Randolph*, No. 99-1235 (filed July 24, 2000) at 34, 45.

Respondents' inability to employ class procedures is likewise irrelevant under *Randolph*. The arbitration agreement at issue in *Randolph* included a class-waiver provision, 531 U.S. at 92 n.7, but the Court did not mention this fact in its analysis of the "costs of arbitration." Moreover, Randolph had argued that "[g]iven the limited economic damages at issue individually, ... consumers aggrieved by the mortgage agreement would be unlikely to invoke their rights ... absent their ability to aggregate their claims and proceed on a class wide basis." Br. of Resp't, *Green Tree Financial Corp.-Ala. v. Randolph*, No. 99-1235 (filed July 24, 2000) at 45. However, the potential impact of the class-waiver provision on the plaintiff's incentive to adjudicate her claims did not factor into the Court's analysis of whether the plaintiff was able "to vindicate her statutory rights in arbitration." *Randolph*, 531 U.S. at 90.

The panel's consideration of financial incentives is not only irrelevant under *Randolph*, it is actually foreclosed by *Concepcion*. In *Concepcion*, the Court expressly rejected the theory that class procedures must remain available to ensure that sufficient financial incentive exists for the advancement of claims that otherwise might not be economically feasible for adjudication. 131 S. Ct. at 1753. This is precisely the rationale employed by the panel, albeit under the guise of *Randolph*'s "vindication" theory. As Chief Judge Jacobs noted in dissent, "*Concepcion* ... vindicated the FAA against an unconscionability challenge that was materially indistinguishable from the challenge upheld in *Amex*." *Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 146 (Jacobs, C.J., dissenting from denial of rehearing *en banc*).

Indeed, the panel ran headlong into the central holding of *Concepcion*. The Court in *Concepcion* held that the FAA prohibits courts from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. But the panel did just that: "in light of the fact that the arbitration provision at issue here does not allow for class arbitration, ... [w]e conclude that this arbitration clause is unenforceable." *Amex III*, 667 F.3d at 219.

In short, the panel's test distorted *Randolph*'s "vindication" theory and employed a mode of analysis expressly foreclosed by *Concepcion*. The panel decision thus cannot stand.

II. IF LEFT UNCORRECTED, THE PANEL DECISION THREATENS TO UNDERCUT THE PRIMARY OBJECTIVE OF THE FEDERAL ARBITRATION ACT.

As explained above, the panel decision rests on a misunderstanding of *Randolph*, and is incompatible with *Concepcion*. But it warrants correction for another reason. The rule of *Amex III* is not grounded in any congressional command in the FAA, the antitrust laws, or any other federal statute.[8] Rather, it is an exercise of judicial policy-making that amounts to a new manifestation of the judicial hostility to arbitration that was the impetus for the FAA in the first place. Because it serves as a basis for federal courts to impose class procedures (or perhaps other complex litigation procedures) on parties that expressly opted not to employ such procedures, *Amex III* is "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775.

For centuries, under the rubric of public policy—most notably, public policy against ouster of the judicial process—English and American courts often held arbitration agreements invalid or otherwise "refused to enforce arbitration agreements specifically." *See Arbitration of Interstate Commercial Disputes: Joint Hearings: Before the Subcomms. on the Judiciary*, 68th Cong. 38 (1924). This hostility was a product of jurisdictional jealousy and a distrust of both arbitrators and arbitration procedures that began in "'ancient

8. As Petitioners explain, *see* Pet. Br. at 23-24, neither the text nor the policies behind the antitrust laws conflict with a contractual requirement of individual arbitration.

times,'" when English courts fought "'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (quoting *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) (quoting *Scott v. Avery*, 5 H.L. Cas. 811 (1856) (Campbell, L.J.))). *See also* H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1-2 (1924) ("Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.").

Congress enacted the FAA as a direct response to this "judicial hostility." *Scherk*, 417 U.S. at 510-11; *see also Mitsubishi*, 473 U.S. at 625 n.14 ("[T]he Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law."). It commands that arbitration agreements are "valid, irrevocable, and enforceable" as a matter of federal law. 9 U.S.C. § 2. Its central mandate thus "requires courts to enforce agreements to arbitrate according to their terms, ... even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Greenwood*, 132 S. Ct. at 669; *Stolt-Nielsen*, 130 S. Ct. at 1773 ("[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'").

The FAA had a separate goal of promoting arbitration as a streamlined, efficient alternative to judicial process. *See, e.g.*, S. Rep. No. 68-536, at 3 (1924) (reflecting objective to avoid "the delay and expense of litigation"); H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation."). It therefore established a presumption in favor of arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), which further bolsters the mandate that courts must "rigorously" enforce agreements to arbitrate according to their terms, *Byrd*, 470 U.S. at 221. *See also Concepcion*, 131 S. Ct. at 1748 ("The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.").

It follows that, under the FAA, federal courts cannot fashion rules of federal substantive law that bar enforcement of arbitration clauses as written where those rules are unmoored to any contrary congressional command. Thus, for example, the Court has repeatedly rejected "judicial policy concern as a source of authority" for invalidating arbitration agreements, emphasizing that "'it is not for us to substitute our view of ... policy for the legislation which has been passed by Congress.'" *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 270 (2009) (quoting *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2338-39 (2008)); *see also Concepcion*, 131 S. Ct. at 1753 ("The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."); *Stolt-Nielsen*, 130 S. Ct. at 1773–1776 (holding that an arbitral

panel exceeded its power under Section 10 of the FAA by imposing class procedures based on policy judgments rather than based upon the arbitration agreement itself).

Contrary to the FAA, then, the panel decision is grounded in the policy concern that claimants will elect not to bring relatively small-dollar claims if they have waived their ability to do so on a class or collective basis. It thus requires, as a matter of judicial policy preference, that consumer arbitration agreements must either allow collective arbitration or face nullification in a broad swath of cases. In effect, it creates a presumption *against* arbitration where a claimant asserts that its federal statutory claims "would not be 'economically rational' to pursue individually." *See Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 142 (Jacobs, C.J., dissenting from denial of rehearing *en banc*). The court's refusal to enforce the arbitration agreement at issue is based on the assumption that arbitration cannot vindicate the public interest to the same extent as judicial class actions, and reflects the very sort of "judicial hostility to arbitration agreements" that the FAA was enacted to reverse. *See Scherk*, 417 U.S. at 510-11; *accord Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (observing that judicial "suspicion of arbitration" is "out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes").

Moreover, in further defiance of the FAA, "[t]he predictable upshot is that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes." *Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 145 (Jacobs, C.J., dissenting from denial of rehearing *en*

banc). The process endorsed by the panel for estimating the value of a plaintiff's claims and the total costs of adjudicating those claims requires a time- and resource-intensive effort to resolve numerous factual questions, some of which would necessitate wading into the merits of the case. As Chief Judge Jacobs explained:

> Whether a dispute may require expert testimony is a question inseparable from the merits .... Without a close inquiry into the merits, no court can decide what expert testimony would be required, or how much discovery is needed. And it cannot be decided whether any discovery or testimony is needed at all without deciding if the claim is dismissible.

Id. at 145-46. Such a costly threshold inquiry would deprive the parties of the very speed and efficiency for which they contracted and thus the principal benefits of arbitration—even if the court ultimately enforced the arbitration agreement.

If allowed to stand, the panel decision will confer upon judges—under the guise of *Randolph*'s "vindication" theory—a roving mandate to cast aside arbitration agreements and to impose complex litigation procedures on parties seeking to enforce such agreements at the threshold of litigation. It "is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver—and other arbitration agreements with such a clause." *Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 143 (Jacobs, C.J. dissenting from denial of rehearing *en banc*). Such a result

would sharply conflict with the FAA's central mandate as well as the federal policies embodied in the FAA. Accordingly, as Petitioners have argued, the Court should "reaffirm that, absent express limitation by Congress on the arbitration of a federal statutory claim, there is no basis for courts to refuse to enforce the FAA's command that arbitration agreements be enforced according to their terms." Pet. Br. at 3.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 28, 2012

AMICUS CURIAE BRIEF

BRIEFS

No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI — The Voice of the Defense Bar ("DRI") is an international organization of more than 23,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a supporter of efforts to make the civil justice system more fair and efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership, to their clientele and to the judicial system. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010). DRI filed a brief as *amicus curiae* at the petition stage of this case urging that the Court grant certiorari.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should reverse the judgment in this case. If affirmed, the decision below will adversely affect the judicial system and the rule of law by subjecting

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

parties to expensive, prolonged proceedings to which they never agreed when contracting for arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

The enforceability of millions of arbitration agreements turns on the answer to the question presented in this case: in what circumstances, if any, may courts invalidate arbitration agreements that prohibit class-wide arbitration of federal claims.[2] The Second Circuit's ruling conflicts in multiple fundamental respects with the Federal Arbitration Act's ("FAA") strong federal policy favoring arbitration agreements. There is no valid basis for allowing parties to evade a clear and unambiguous class action waiver simply on a showing that an individual claim is not economically feasible because of the cost of retaining expert witnesses. Unless it is reversed, the ruling below will undermine arbitration's recognized advantages and will create powerful disincentives to arbitration. Accordingly, allowing the decision below to stand would be "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

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[2] "Once rare, class action waivers are today included in millions of credit card and other financial services agreements nationwide." Kaplinsky & Levin, *Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 Bus. Law. 923, 923 (Feb. 2006) (footnote omitted); Rice, *The Battle of Enforceability: Class Action Waivers in Mandatory Arbitration Clauses*, 27 Banking & Fin. Servs. Policy Rep. No. 4 at *1 (April 2008) (essentially same).

All parties to this litigation are business entities that entered into commercial contracts prescribing bilateral arbitration as the dispute resolution mechanism of choice. The contracts memorialize in the clearest, most unambiguous of terms the parties' agreement that their disputes are *not* subject to class-wide adjudication. Yet, the court of appeals overrode that express contractual waiver of class action proceedings solely because of the potential cost of retaining an expert witness to support plaintiffs' claims. In direct contrast to the written contract, the Second Circuit held in this case that the class action waiver was not enforceable and also that the arbitration agreement was not enforceable. In short, the case was not subject to individual adjudication or even to arbitration. That result does not reflect valid contract interpretation, nor does it reflect valid statutory construction. Nor, in the final analysis, does that result reflect sound public policy because it leaves to chance and uncertainty an important subject that the parties had every reason to believe their written contract had definitively resolved.

The decision below makes the enforceability of arbitration agreements highly unpredictable for businesses with operations, vendors or customers dispersed regionally and nationally. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable in accordance with contractual terms. Moreover, by refusing to enforce the agreement at issue in this case, the court of appeals made clear that it has adopted a rule that contracts providing for bilateral arbitration are

unenforceable whenever a plaintiff contends that its case will entail expensive expert testimony. In effect, the decision below creates a judicial cost-shifting mechanism that is contrary to sound legislative policy determinations.

ARGUMENT

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

This Court has long endorsed arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity"). In enacting the FAA, Congress confirmed the strong national policy in favor of arbitration. *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (citing several additional precedents); *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1203 (2012); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Parties competent to enter into a contract are also competent to enter into an arbitration agreement. *United States v. Moorman*, 338 U.S. 457, 461-62 (1950). And courts are required to enforce arbitration agreements in accordance with their stated terms. *See, e.g., CompuCredit*, 132 S.Ct. at 669; *Concepcion*, 131 S.Ct. at 1745; *Granite Rock Co.*

v. Int'l Broth. of Teamsters, 130 S.Ct. 2847, 2857 (2010); *cf. The Harriman*, 76 U.S. 161, 173 (1869) ("It is the province of the courts to enforce contracts – not to make or modify them").

Commentators have already criticized the decision below and have observed that "the correctness of the Second Circuit's decision is very doubtful" in light of this Court's precedents. Blackman, Rozenberg & Sidhu, *Tackling Class Action Waivers in Arbitration Clauses*, N.Y.L.J. (June 11, 2012). That view is indeed accurate. This Court's precedents compel reversal.

A. This Court has Rejected "Excessive Costs" and "Policy" Rationales for Invalidating Class Action Waivers

None of the explanations offered by the Second Circuit provides a valid basis for distinguishing this Court's controlling decisions. Both *Stolt-Nielsen* and *Concepcion* held that class claims are not appropriate subjects for arbitration unless the parties expressly agree otherwise, and *Concepcion* directly held that the FAA preempts state laws invalidating commercial arbitration agreements on the ground that they forbid class arbitration. Further, *Concepcion* necessarily rejected the central premise underpinning the Second Circuit decision, *viz.*, the "prohibitive costs" justification for conditioning enforcement of arbitration agreements on the availability of classwide arbitration procedures.

The "prohibitive costs" justification figured prominently in the *Concepcion* dissent, but made no headway with the majority. Specifically, the dissenting opinion in *Concepcion* declared that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." 131 S.Ct. at 1760 (Breyer, J., dissenting); *see id.* at 1761 ("nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds"). But, the *Concepcion* majority made clear that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753 (majority opinion); *see also Stolt-Nielsen*, 130 S.Ct. at 1770 n.7 (essentially same).

Accordingly, the Second Circuit was wrong to rely on a position advanced by the dissent that the majority in *Concepcion* rejected. *See, e.g., Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012) (noting that *Concepcion* "majority expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"). The majority's rejection of this point is particularly noteworthy because the respondent in *Concepcion* repeatedly cited "costs" as a justification for invalidating the class waiver. *See* Brief for Respondent in No. 09-893, at 29, 41, 43-44, 51-52; *see also Hendricks v. AT&T Mobility, LLC*, 823 F. Supp.2d 1015, 1021 (N.D. Cal. 2011) (making same point). With that backdrop, the majority expressly rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that

might otherwise slip through the legal system." 131 S.Ct. at 1753. Had the view of the *Concepcion* respondent — espoused by the dissent — prevailed, the Court's judgment necessarily would have been different. *Cf. Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853); *see also Sumner v. Mata*, 455 U.S. 591, 596-97 (1982) (*per curiam*) (reversing where the court of appeals on remand "reinstated" its prior conclusion, followed the "dissenting opinion" in the prior case before this Court, and "apparently misunderstood the terms of [this Court's] remand").

In contrast with the decision below, three other circuits have correctly interpreted *Concepcion* as repudiating "excessive costs" defenses to class waivers in arbitration agreements. *See Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (citing *Concepcion* and rejecting argument that "class action litigation is the only effective remedy such as when the high cost of arbitration compared with the minimal potential value of individual damages denies every plaintiff a meaningful remedy"); *Coneff*, 673 F.3d at 1159 ("Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that"); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011) (noting that plaintiffs produced evidence that it would be economically impractical to bring individual claims in arbitration, and agreeing that most of these small-value claims will go undetected and unprosecuted, yet nonetheless holding that "faithful adherence to *Concepcion* requires the rejection of the Plaintiffs' argument"); *accord* Pet.

App. 138a, 141a, 148a-49a (dissenting opinions citing these cases).[3]

It is no answer to say — as Judge Pooler commented in an opinion concurring in the Second Circuit's denial of rehearing — that the other circuits applying *Concepcion* dealt with an "incentive" to bring claims, rather than with the "ability" to bring claims. Pet. App. 131a. That is an illusory distinction. Moreover, this Court rejects "general policy goals" as a basis for overriding an otherwise clear and unambiguous arbitration agreement. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *accord McMahon*, 482 U.S. at 240.

Nor does it matter (*see* Pet. App. 16a, 129a), that this case involves federal statutory rights rather than state contractual rights. *See* Blackman, Rozenberg & Sidhu, *supra* at 5 ("[t]he Supreme Court may find this to be a distinction without a difference, and reject the Second Circuit's view"); *accord* Pet. App. 143a ("This labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded"). *Concepcion* rested squarely on the language of the FAA. Since that language preempts conflicting state law under the Supremacy Clause, then *a fortiori* the same reading of the same

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[3] *See also, e.g., Jasso v. Money Mart Exp., Inc.* — F. Supp.2d —, 2012 WL 1309171, at *7 (N.D. Cal. 2012) (rejecting Second Circuit opinion in this case); *Brokers' Servs. Mktg. Group v. Cellco P'ship*, 2012 WL 1048423, at **3-5 (D. N.J. Mar. 28, 2012) (following *Concepcion* and rejecting same argument that Second Circuit adopted).

language governs federal law. Indeed, this Court has specifically held that the duty to enforce an arbitration agreement "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/AMEX, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *accord CompuCredit*, 132 S.Ct. at 669; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) (Age Discrimination in Employment Act does not preclude arbitration of claims brought under that statute); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-24 (2001) (arbitration not inherently inconsistent with enforcement of federal statutory rights). Surely nothing in the FAA or the federal antitrust statutes exempts antitrust claims from arbitration agreements. *See Mitsubishi*, 473 U.S. at 628, 632 (non-dicta direct holding in antitrust case).[4]

B. The Court of Appeals Improperly Treated Dicta from this Court as Binding

Despite the governing authority of *Stolt-Nielsen* and *Concepcion* the court of appeals felt

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[4] Further, even if the waiver here somehow were deemed to conflict with "rights" provided by Fed. R. Civ. P. 23, parties are free to waive procedural rules. *See, e.g., Caudle v. Am. Arbitration Assn.*, 230 F.3d 920, 921 (7th Cir. 2000) ("[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants"); *Lloyd v. MBNA Am. Bank*, 27 Fed. Appx. 82, 84 (3d Cir. 2002) (right to a class action is "merely procedural" and may be waived); *see also* Pet. App. 147a ("The ability to spread costs among a class is only a procedural right"), 148a (similar).

bound by, in the panel's words, "dicta" (Pet. App. 19a, 22a) in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) and *Mitsubishi*. In *Randolph*, this Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." 531 U.S. 79, 90 (2000). Treating that dicta as "controlling," the panel reaffirmed its prior conclusion that the arbitration agreement here is "unenforceable" because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive." Pet App. 24a, 25a (internal quotations omitted).[5]

This holding was erroneous for multiple reasons. First, dictum is not binding, especially when more recent opinions counsel a different result. *See, e.g., Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007)

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[5] Although respondents now purport to dispute (Pet. Opp. 13) that the relevant *Randolph* passage was *dicta*, they are incorrect. In addition to the explicit understanding of the Second Circuit, numerous other courts have correctly recognized that the *Randolph* passage was *dicta*. *See, e.g., James v. Conceptus, Inc.*, 851 F. Supp.2d 1020, 1034 (S.D. Tex. 2012); *D'Antuono v. Serv. Road Corp.*, 789 F. Supp.2d 308, 334 (D. Conn. 2011); *Little v. Auto Stiegler, Inc.* 63 P.3d 979, 992 (Cal. 2003). Commentators have done likewise. *See, e.g.*, Drahozal & Wittrock, *Is There a Flight From Arbitration?*, 37 Hofstra L. Rev. 71, 110 n.181 (2008) (*Green Tree*'s "costs" language was "dictum"); Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake The Rules of Litigation in Arbitration's Image*, 30 Harv. J. L & Pub. Pol., 579, 588 n.28 (2007) (same); Jackson, *Green Tree v. Randolph: Will the Court's Decision Lessen The Effect of the FAA in Consumer Arbitration?*, 6 T.G. Jones L. Rev. 57, 60 (2002) (same). *See also* Pet. App. 143a-45a (dissenting opinions).

(plurality opinion); *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it"); *Cohens v. Va.*, 6 Wheat. 264, 399-400 (1821) (Marshall, C.J.). Indeed, *Randolph* expressly declined to address whether the arbitration agreement was unenforceable because of a class action waiver. *See* 531 U.S. at 92 n.7.

Even if the relevant language of *Randolph* were not dicta, the Second Circuit read too much into the decision. *Randolph* dealt only with costs unique to arbitration that could effectively foreclose access to the arbitral forum. *See, e.g., Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp.2d 1042, 1049 (N.D. Cal. 2011) ("[i]f *Green Tree* [*v. Randolph*] has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages"). In this case, the only supposedly excessive costs are for *experts*, not for the *arbitrators*. Indeed, the Second Circuit panel opinion made it crystal clear that its concern is not with the cost of arbitration at all. It is solely the cost of pursuing an individual claim in any forum that animates the panels' holding. Pet App. 27a ("We again find 'Amex has brought no serious challenge to the plaintiffs' demonstrations that their claims cannot be pursued as individual actions, whether in federal court or in arbitration'"). No decision from this Court extends

the dicta in *Randolph* to situations where such costs would be the same in both arbitration *and* litigation.

The court of appeals' reliance on dicta from a footnote in *Mitsubishi*, 473 U.S. at 637 n.19, finds even less support. *See* Pet. App. 19a, 50a, 94a, 128a.[6] This Court has never invalidated an arbitration agreement under the "prospective waiver" dicta from *Mitsubishi*. Of course, Mitsubishi arose in the context of potential concern that United States substantive law would not be applied in an international arbitration. No such concern exists here. Further, this Court has clarified that the *Mitsubishi* footnote is relevant — if at all — only at the arbitral award-enforcement stage. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995); *see also Lindo*, 652 F.3d at 1267 (same point). Yet the Second Circuit treated *Mitsubishi* as controlling at the pre-award stage. This misapplication of *Mitsubishi* should be corrected.

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[6] There is no dispute that this language from *Mitsubishi* was dicta. *See, e.g., Lindo v. NCL (Bahamas), Ltd.* 652 F.3d 1257, 1266-67 (11th Cir. 2011); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295-96 (9th Cir. 1998) (en banc); *D'Antuono v. Service Road Corp.*, 789 F. Supp.2d 308, 332-33 (D. Conn. 2011); *Grynberg v. BP P.L.C.*, 596 F. Supp.2d 74, 78-79 (D. D.C. 2009).

II. FLAWS IN THE SECOND CIRCUIT'S POLICY JUSTIFICATIONS PROVIDE ADDITIONAL REASONS FOR REVERSAL

Even if this Court's precedents allowed policy factors to override the express language of arbitration agreements, sound reasons would still dictate reversal. This Court has repeatedly recognized the benefits of arbitration: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g. Concepcion,* 131 S.Ct. at 1749; *Stolt-Nielsen,* 130 S.Ct. at 1775; *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute"). As this Court cautioned: "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland,* 465 U.S. at 7.

Class action waivers "have been upheld by the vast majority of federal courts and most ... state courts, notwithstanding objections by consumers that class action waivers are unconscionable and inconsistent with statutory rights." Kaplinsky & Levin, 61 Bus. Law. at 923-24 (footnote omitted). In contrast to such decisions — and to this Court's

ruling in *Southland* — the Second Circuit's approach is

> unworkable as a practical matter of judicial administration. Under his approach, every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiffs case. Defendants predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's costs of proof. It is highly doubtful that in striking down the *Discover Bank* rule [in *Concepcion*], the Supreme Court intended to open the door to such proceedings as a means for plaintiffs to avoid arbitration agreements.

Kaltwasser, 812 F. Supp.2d at 1049; *accord Hendricks*, 823 F. Supp.2d at 1021-22 (agreeing with above).

These same concerns were highlighted by the judges who dissented from the denial of rehearing in this case. *See* Pet. App. 139a-40a. In short, the Second Circuit's approach cannot be reconciled with "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 22 (1983). *Accord, Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

Nor is the court of appeals' decision bound to the facts of this case. As the dissenting judges pointed out, there is no reason to believe that the court of appeals' "excessive costs" reasoning would be limited to antitrust cases. Costly experts are engaged in a variety of potential claims. Indeed, Chief Judge Jacobs' dissent noted that the court of appeals' ruling "can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver — and other arbitration agreements with such a clause." Pet. App. 137a.

Commentators have already warned that, if allowed to stand, the decision below "could have the effect of preventing arbitration of any kind in cases where a federal statutory claim is asserted on behalf of a purported class, thereby forcing a corporate defendant into the very sort of judicial class action that it can be presumed to have wished to avoid through an arbitration agreement." Blackman, Rozenberg & Sidhu, *supra* at 5. *Cf.* Rice, *Enforceable or Not?*, 45 Hou. L. Rev. at 224 (characterizing "the use of the class-action arbitration bans as a legitimate contract tool used to defend[] companies from the ever-increasing onslaught of frivolous multimillion-dollar class action lawsuits"). "This would be a paradoxical result indeed, and one difficult to square with the Supreme Court's decided preference for upholding arbitration agreements." Blackman, Rozenberg & Sidhu, *supra* at 5.

Experience teaches — as Congress and the courts have perceived — that class actions can give rise to unacceptable abuses and risks wholly

unrelated to whether a claim has the slightest merit. "Such leverage can essentially force corporate defendants to pay ransom . . ." S. Rep. No. 109-15, at 17 20-21 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 21. But the court of appeals' decision gives plaintiffs even more front-loaded power in settlement negotiations. Rather than follow the Second Circuit's course, this Court would do well to heed the voices of judges who live with the reality of class action litigation at the trial level:

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 2010 WL 3855552, at *28 (E.D. Pa. Sept. 30, 2010) (citation omitted); *accord* Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (2010) (similar point).

The overwhelming majority of class actions result not in adjudication to final judgment on the merits, but in settlements. *See Concepcion*, 131 S.Ct. at 1752 (recognizing "risk of 'in terrorem' settlements that class actions entail"; citation omitted).[7] As this Court noted, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 131 S.Ct. at 1752; *accord Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (noting pressure for defendants to settle class actions, even if adverse judgment seems "improbable"). If companies can protect themselves against the high costs of litigation and the potential of paying damages on "frivolous" class claims then the public undoubtedly benefits. *See* Rice, *Enforceable or Not?*, 45 Hou. L. Rev. at 247 ("Because companies are able to keep their costs down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices").

If the decision below is affirmed, clients cannot be counseled reliably on how to draft

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[7] Empirical studies and numerous commentators confirm that "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies . . . confirm what most class action lawyers know to be true"); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial"); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce*, 513 U.S. at 279. By its stated terms, the Second Circuit decision is incompatible with the concept of universal enforceability: "we hold that each waiver must be considered on its own merits, based on its own record ...." Pet. App. 29a. If this Court were to affirm, clients and the lawyers from whom they seek advice regarding class action waivers in arbitration agreements would be left totally adrift. Trial and appellate courts nationwide would also be totally adrift.

The consequences of such entrenched uncertainty are readily discernible: more litigation and burgeoning expense as, with increasing frequency, the parties' expressly stated preference for quicker, less costly individual arbitration is thwarted. Subject to the vagaries of different jurisdictions reading identical contractual language in different ways, or coming to different conclusions on similar records of "expense," it is predictable that some parties may come to disfavor arbitration clauses altogether. In *Southland*, this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 465 U.S. at 15. That, however, is precisely the upshot of the court of appeals' decision here. The resulting uncertainty is especially vexing for businesses with operations, vendors or customers dispersed regionally and nationally. *Moses H. Cone*, 460 U.S. at 25 n.32 (the

FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"). When, as in this case, parties have done everything possible to clearly and unambiguously memorialize their agreement that disputes be resolved without class adjudication, judicially-created uncertainty cannot be justified.

Typically, when individual claims are minimal the stated justification for class-wide adjudication is that otherwise there would be no remedy to deter defendants from engaging in the conduct that is challenged. The Second Circuit adverted to that rationale. Pet. App. 11a-12a (enforcing the class action waiver "'would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recover'")(quoting earlier panel opinion); *see, e.g., id.* at 25a-30a. Whatever validity that contention may have in a situation where the claims have merit, the reality of the vast majority of class action cases is that the merits are never tested. And, when the claim is that a defendant violated a federal statute — here, the antitrust laws — public enforcement authorities have full power to seek remedies that provide any appropriate deterrent effect.

In this case, plaintiffs are all businesses that entered into contracts expressly precluding class-wide adjudication. The individual claims are in the thousands of dollars and the potential individual recoveries range up to almost $40,000. Pet. App 26a. If a class action waiver is unenforceable here, when would one be enforceable?

There are powerful reasons to prefer public enforcement officials as the parties responsible for making the critical cost-benefit analysis. Government enforcement efforts, in antitrust and other regulated areas, are routinely magnets for tag-along private class actions that follow in the government's footsteps at a fraction of the cost of original litigation. In contrast, a decision by private attorneys to incur massive costs they hope eventually to impose on the defendant for claims that will almost certainly never be tested on the merits provides little assurance that the public interest is being served. There is, accordingly, scant justification to subject defendants to the risks of paying these costs, along with their own litigation costs (including defense experts), while facing the risk of massive potential liability for claims whose merits will likely never be resolved.[8]

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[8] *See, e.g., Kamm v. Cal. City Devel. Co.*, 509 F.2d 205, 212-13 (9th Cir. 1975) (government better suited to remedy harm than private class action); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D.N.J. 1998) ("[T]here is insufficient justification to burden the judicial system with Plaintiffs' claims while there exists an administrative remedy that has been established to assess the technical merits of such claims"); *Brown v. Blue Cross & Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 45-47 (E.D. Mich. 1996) (holding that defendants' settlement agreement with state attorney general and insurance commissioner adequately served the interests of the proposed class and, therefore that a class action was unnecessary). Government enforcement minimizes the possibility of conflicts among potential victims, and returns more dollars to injured parties without payment of counsel fees. Moreover, the government is better positioned than the private bar to prioritize investigations and prosecutions without the need to comply with costly class action administrative

A final practical shortcoming of the Second Circuit's approach is that it misperceives or overlooks significant aspects of real-world litigation. For example, the panel observed (Pet. App. 27a) that even the treble damages and fee-shifting provisions of the Clayton Act were "inadequate to alleviate our concerns" because "plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs" (internal quotes omitted). But, why should the risk of losing a non-meritorious case be a factor that enables a plaintiff to avoid its contractual agreement to bilateral arbitration? And, if the prospect that a claim will fail can be a factor on the plaintiff's side of the equation, why eliminate or discount that very same prospect on the defense side of the equation? In short, why compel all parties to incur massive class action litigation expenses on the assumption that plaintiffs will have a successful claim for which they may shift their expert witness costs to the defendant without even weighing the distinct possibility that plaintiff's claims may have no merit whatsoever?

Viewed in proper context, the Second Circuit's approach creates a cost-shifting mechanism that conflicts with statutory limits on recovery of expert witness fess. The opinions below advert to the per diem limit in 28 U.S.C. §1821(b) for taxing witness costs in favor of the prevailing party. Pet. App. 91a, 132a. In the Second Circuit's analysis, the modest per diem figure constitutes a reason to support class

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requirements. *See, e.g.*, Griffin, *Reinventing Adequacy: The Need for Standardized Regulation*, 23 Geo. J. Legal Ethics 603, 613-16 (2010) (making similar points).

action status. That conclusion is incorrect for multiple reasons. First, it is the limit Congress selected. *Id.* at 137a-138a (dissenting opinion). Courts cannot simply substitute their own policy notions in place of policy judgments enacted by Congress and signed into law by the President. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003); *Hartford Underwriters Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-34 (1985) (upholding statutory $10/day maximum fee recovery for attorneys representing veterans in benefits cases). Second, the statutory limit on fees taxable as costs upon entry of judgment does not control the amounts that can be allocated for expert witnesses in the event of a settlement. And, since the vast majority of cases certified as class actions result in settlement (*see* pp. 15-16 & n. 7, *supra*), §1821(b) is not dispositive in the vast majority of relevant cases. Third, precisely because so few class actions are contested through trial, there is no justification for overriding millions of contractual agreements because of a statutory limit on witness fees in the rare event of an adjudicated final judgment.

Even in the circumstances that the Second Circuit envisions, other available cost-sharing mechanisms would permit cases to proceed without undoing the parties' written contracts. When a defendant's conduct allegedly injured many potential plaintiffs (which should, by definition, be every case that meets the numerosity requirement of Fed. R. Civ. P. 23(a)(1)), nothing prevents an agreement among plaintiffs to share the costs of hiring an

expert to prepare a report that could be used in all cases, or to designate a "lead" case that will dispose of issues in ways that are applicable to the remaining plaintiffs. These cost-sharing opportunities are available whether all plaintiffs are represented by the same lawyers or multiple lawyers are involved. And, they actually involve a sharing of costs by parties on the same side of the case regardless of the result. In contrast, the Second Circuit's holding involves no "sharing" or spreading of costs among plaintiffs unless the entire expense is shifted to the defendant.

Moreover, it has become a reality of litigation in the 21st century that outside funding sources underwrite claims deemed to be attractive investments. *See, e.g.*, Raymond, *More Attorneys Exploring Third-Party Litigation Funding*, N.Y.L.J. (June 4, 2010). Without addressing the wisdom or policy ramifications of non-party litigation funding, it would be shortsighted to devise rules of law — as the Second Circuit did in this case — that focus solely on the imagined costs and potential benefits to "plaintiffs" without recognizing that entities other than the "plaintiffs" will incur much, if not all, of the costs and will derive much, if not most, of the benefit from a settlement or favorable judgment. Indeed, given the existence of such non-party underwriters, courts should be even more wary to promote a system that confers upon plaintiffs in the earliest stages of litigation the powerful weapon of class certification as a club for inducing settlements in cases of dubious merit. *See supra* at 15-16.

The Second Circuit's policy choice is further flawed because it encourages an escalation of litigation costs for the parties and the courts. It is not hard to imagine the race for ever more expensive experts when the likelihood of class action status increases as the expert's fee increases. There should be no mistake about the prolix, costly proceedings that the decision below will generate. The foundation of the Second Circuit holding — indeed, the cornerstone of its preference for case-by-case analysis — is that Amex did not produce sufficient evidence of alternative ways for plaintiffs to enforce their "statutory rights." Pet App. 11a, 27a, 38a, 53a, 93a. Under the Second Circuit's regime, a defendant who signed a written contract that provides for arbitration as the sole dispute-resolution mechanism and that expressly precludes class-wide adjudication will now be drawn into proceedings where it must litigate such threshold issues as: Is the proposed expert analysis necessary or reasonable? Do any alternative methodologies exist? Are less expensive experts available? Further, the defendant will need to retain an expert on litigation costs to counter plaintiff's expert. In a system based on more rational, more practical economic premises, these are just the sort of issues and costs one would seek to avoid by opting for individual arbitration in the first place.

Under the decision below, all of this will play out in court just to determine whether the arbitration agreement is enforceable. Since this issue will be litigated at the most preliminary stages of the dispute, it should be clear that at that point there could be no confidence that plaintiff's claim

has any merit or even that plaintiff will be able to satisfy the requirements for class certification. Accordingly, this Court should refuse to accept the policy judgments that inform the Second Circuit's holding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMERICAN EXPRESS COMPANY, *et al.*,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

No. 12-133

AMERICAN EXPRESS COMPANY, *et al.*,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioners before this Court and thus urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 major U.S. corporations collectively employing close to twenty million people. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, most of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration by avoiding costly, complex, and protracted class-based proceedings.

A two-judge panel[2] of the Second Circuit below, ostensibly applying the "federal substantive law of

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[2] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8,

arbitrability," refused on policy grounds to enforce a commercial arbitration agreement containing a class action waiver provision. The Second Circuit panel concluded that the arbitration agreement was unenforceable based upon the Respondents' showing that the cost of proving their case would be substantial, so that absent the ability to share that cost by proceeding collectively, they would be unable to vindicate their statutory rights. *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)*, 667 F.3d 204 (2d. Cir. 2012). Although the agreement containing the challenged class action waiver provision arose in the commercial context, the Court's ruling also potentially could influence the use of mandatory arbitration agreements generally, and class action waivers specifically, in other contexts, including employment.

EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court.[3] Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the

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2009. The remaining two panel members, who are in agreement, have determined the matter. Pet. App. 1a n.2 (citation omitted).

[3] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010); *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010); and *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011).

issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondents are a group of retail businesses that agreed to accept American Express (AMEX) cards for consumer purchases. Pet. App. 4a. In exchange, they signed AMEX's Card Acceptance Agreement, which contains a binding arbitration provision. Pet. App. 7a-8a. The arbitration provision includes an express class arbitration waiver clause that reads, in relevant part, "IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM ... YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION." Pet. App. 8a-9a.

Respondents sued American Express in federal court, claiming that AMEX's "Honor All Cards" policy – which required the businesses to accept AMEX charge cards as well as its credit cards, constitutes an impermissible "tying arrangement" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet. App. 6a. AMEX moved to compel arbitration. Pet. App. 9a. They argued that the class action waiver is unenforceable because it prevents them from effectively vindicating their statutory rights. Pet. App. 2a. Specifically, Respondents claimed that the cost of obtaining the expert testimony needed to prove their antitrust claims individually would far outweigh the amount each could be expected ultimately to recover in damages. Pet. App. 11a.

The trial court rejected Respondents' "prohibitive costs" argument and compelled arbitration, pointing

out among other things that they would incur the same costs whether they proceeded in arbitration or in court. Pet. App. 112a-113a. A three-judge panel of the Second Circuit reversed, concluding that the class action waiver was unenforceable because it essentially would "preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." Pet. App. 62a. AMEX then petitioned the Supreme Court for a writ of certiorari. Pet. App. 12a.

While the petition was pending, this Court issued its decision in *Stolt-Nielsen, S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), which held that parties to an arbitration agreement cannot be forced to proceed on a class-wide basis where the agreement itself is silent as to the availability of class arbitration procedures. Pet. App. 12a-13a. The Court subsequently granted AMEX's petition, vacated the Second Circuit's ruling, and remanded the case in light of *Stolt-Nielsen*. Pet. App. 12a.

On remand, the Second Circuit deemed *Stolt-Nielsen* inapplicable, and again ruled the class action waiver unenforceable. Pet. App. 2a. Shortly thereafter, this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that California's *Discover Bank* rule, which effectively barred the use of class action waiver clauses in arbitration agreements, was inconsistent with the Federal Arbitration Act (FAA) and therefore unenforceable as a matter of law. Pet. App. 142a.

The Second Circuit once again revisited the *AMEX* case, this time in light of *Concepcion*, and determined that neither *Concepcion* nor *Stolt-Nielsen* addresses the specific question presented. Pet. App. 3a. A two-judge panel of the Second Circuit concluded once again that because Respondents' "only economically

feasible means" of enforcing their statutory rights is "via a class action," the entire arbitration agreement was unenforceable. Pet. App. 14a.

AMEX filed a petition for rehearing and rehearing *en banc*, which was denied over the dissenting votes of five members of the appeals court. Pet. App. 127a-149a. This Court granted AMEX's second petition for a writ of certiorari on November 9, 2012.

SUMMARY OF ARGUMENT

This Court consistently has ruled that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, establishes a "liberal federal policy favoring arbitration agreements ...." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 669 (2012). The presumption favoring arbitration applies even to statutory claims, unless Congress has clearly mandated otherwise. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Indeed, the only exception to that general rule is found in the FAA itself, which allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Even this language, however, does not permit attacks on arbitration agreements solely because they *are* arbitration agreements, *i.e.*, that they require the parties to submit a dispute to arbitration rather than litigating in court. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

The ability to bring a class action is one of the procedural rights that can be waived in a valid arbitration agreement. *Id.* at 1753. Accordingly,

the Second Circuit's ruling below declaring that an arbitration agreement containing a class action waiver is unenforceable because claimants will not be able to spread among a group of litigants the cost of proving their case with expert testimony in arbitration, which they could do in class action litigation in court, must fail. The decision below is inconsistent with the FAA and *Concepcion* and should be reversed.

Moreover, invalidating arbitration agreements because they contain class action waivers defeats the advantages and mutual benefits of arbitration, especially in the employment context. Individual arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions . . . [in] the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). Given that the primary purpose of employment arbitration agreements is to resolve employment disputes quickly and inexpensively, the Second Circuit's ruling creates a chilling effect on employers' efforts to maintain binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

ARGUMENT

I. UNDER THE FEDERAL ARBITRATION ACT AND THIS COURT'S JURISPRUDENCE, AN ARBITRATION AGREEMENT CONTAINING A CLASS ACTION WAIVER MUST BE ENFORCED ABSENT A SHOWING THAT CONGRESS INTENDED TO PRECLUDE ARBITRATION, OR THAT GROUNDS EXIST FOR REVOCATION OF ANY CONTRACT

A. The Strong Federal Policy Favoring Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This language both represents "a congressional declaration of a liberal federal policy favoring arbitration agreements ...," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 2776 (2010). *See generally CompuCredit Corp. v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 669 (2012). The FAA thus "establishes that, as a matter of federal law, any

doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (footnote omitted).

Indeed, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (citation omitted). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted). Accordingly, "[i]n line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted).

This Court repeatedly has reaffirmed the federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). In *Gilmer*, this Court held that an

arbitration agreement signed by the plaintiff as a condition of employment, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the FAA, so as to require him to arbitrate his federal age discrimination claim. In so doing, the Court established as a general rule that, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (citations omitted).

Indeed, the sole exception to the general rule is that the FAA allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court pointed out in *Concepcion*, "[t]his saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. at 1746 (citations omitted). Accordingly, the FAA does not permit attacks on arbitration agreements solely because they *are* arbitration agreements, *i.e.*, that they require the parties to submit a dispute to arbitration rather than litigating in court.

B. An Arbitration Agreement Containing A Class Action Waiver Is Enforceable Under The FAA

Parties to arbitration agreements often agree to streamlined procedural mechanisms. As this Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review

of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. at 1469 ("The decision to resolve ... claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace ... discrimination; it waives only the right to seek relief from a court in the first instance").

The ability to bring a class action is one of the procedural rights that can be waived in a valid arbitration agreement. As the Seventh Circuit has observed:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

Champ v. Siegel Trading Co., 55 F.3d 269, 276 (7th Cir. 1995) (citations omitted); *see also Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," noting that "the relative benefits of class-action arbitration are much less assured ...").

This Court held in *Concepcion* that California's *Discover Bank* rule, which conditioned the enforceability of an arbitration agreement on the availability of classwide arbitration procedures, was "preempted by the FAA." 131 S. Ct. at 1753. The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Accordingly, *Concepcion*

stands for the proposition that a state law rule making an arbitration agreement unenforceable if it contains a waiver of classwide arbitration cannot survive scrutiny under the FAA.

C. The Second Circuit's Theory That The Inability To Share Expert Witness Fees Defeats An Arbitration Agreement Containing A Class Action Waiver Is Untenable Under The FAA And *Concepcion*

If the FAA trumps a state law ruling making an arbitration agreement unenforceable because it contains a class action waiver, then a federal court ruling seeking to override a similar agreement on policy grounds must meet the same fate. Accordingly, the Second Circuit's ruling below declaring that an arbitration agreement containing a class action waiver is unenforceable because claimants will not be able to spread among a group of litigants the cost of proving their case with expert testimony in arbitration, which they could do in class action litigation in court, must fail. While the decision below is couched in terms of "federal substantive law of arbitrability" rather than a state court ruling, it cannot survive a *Concepcion* analysis, for several reasons. Pet. App. 16a (citation and internal quotations omitted).

First, the Second Circuit's ruling strikes down the arbitration agreement precisely because it *is* an arbitration agreement, *i.e.*, that it requires the parties to proceed in arbitration on an individual basis where they would be allowed to proceed on a classwide basis were they in court. As noted above, *Concepcion* specifically precludes this type of challenge to an arbitration agreement. 131 S. Ct. at 1746.

Second, this Court in *Concepcion* expressly rejected the notion, raised by the dissent in that case, that arbitration agreements containing class action waivers should not be enforced because "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. On the contrary, the Court said, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* Thus, the contention that individual claims could be prosecuted more cost-efficiently in class arbitration cannot trump the FAA's mandate that arbitration agreements be enforced according to their terms. *Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (noting that "federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement") (footnote omitted).

Third, this Court previously has ruled that being unable to bring a collective action in arbitration does not prevent the arbitral forum from furthering the purposes of a federal statute and thus does not preclude enforcement of an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting claim that the inability to proceed collectively deprives claimants of substantive rights under the federal Fair Labor Standards Act, based on similar conclusion in *Gilmer* with respect to the Age Discrimination in Employment Act).

Fourth, the Second Circuit bases its entire rationale on a policy concern that it cloaks under "federal substantive law of arbitrability" drawn erroneously from dicta in two decisions of this Court. In

Green Tree Financial Corp.-Alabama v. Randolph, this Court rejected the contention that an arbitration agreement was unenforceable merely because it was silent as to the payment of arbitration fees and costs, and thus failed to protect a claimant from potentially significant costs of pursuing her federal statutory claim in arbitration, holding instead that the agreement's silence on the subject of fees and costs did not render it unenforceable. 531 U.S. 79 (2000). The Court remarked that "[i]t may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90 (dictum).

Similarly, while upholding an arbitration agreement in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, the Court remarked, again in dicta, that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. 614, 637 (1985) (dictum). From this language, the Second Circuit incorrectly jumped to the conclusion that where classwide arbitration procedures are unavailable to permit claimants to share their expert witness costs, a court may refuse to enforce an arbitration agreement on the ground that the claimants will be unable effectively to vindicate their statutory rights.

The Court in *Green Tree*, however, was referring specifically to potential costs of *arbitration* that do not arise in litigation, *e.g.*, administration and arbitrator's fees. *See Green Tree*, 531 U.S. at 89 ("We now turn to the question whether Randolph's agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial

costs of pursuing her federal statutory claims in the arbitral forum"); *see also* 531 U.S. at 90 ("She contends ... that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners").

The costs at issue here, on the contrary, are those of expert witness testimony, expenditures that also would be made if Respondents were to pursue their claims in court. Thus, the expenses Respondents seek to share, and find prohibitive if they cannot, are not the costs of arbitration, but the potential costs of making their case in any forum.[4]

Ultimately, the Second Circuit panel's ruling creates a Hobson's choice for Petitioners – either allow Respondents to override the class action waiver clause in the arbitration agreement, or forego arbitration altogether and face class litigation in court. Placing Petitioners in this position contravenes the *actual* "federal substantive law of arbitrability," which is "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Mitsubishi*, 473 U.S. at 626 (citing *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25).

As the Eleventh Circuit has pointed out, "[i]t would be anomalous indeed if the FAA – which promotes arbitration – were offended by imposing

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[4] Notably, the Second Circuit accepted at face value a consultant's opinion as to the cost of expert testimony to prove Respondents' case, and overlooked the fact that parties to arbitration, not being bound by the traditional rules of evidence, may inform the arbitrator in far less expensive ways. Pet. App. 147a.

upon arbitration nonconsensual procedures that interfere with arbitration's fundamental attributes, but not offended by the nonconsensual elimination of arbitration altogether." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1213 (11th Cir. 2011) (citation omitted). Accordingly, the decision below is inconsistent with the FAA and *Concepcion* and should be reversed.

II. INVALIDATING ARBITRATION AGREEMENTS BECAUSE THEY CONTAIN CLASS ACTION WAIVERS DEFEATS THE ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATION, ESPECIALLY IN THE EMPLOYMENT CONTEXT

As this Court has observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and those containing class action waivers specifically, is particularly misplaced in the employment context, where individual arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions ... [in] the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.* at 123. Arbitration offers lower-level employees an opportunity to bring forth claims that would not be

economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003). Indeed, parties generally favor arbitration precisely because of the economics of dispute resolution. *14 Penn Plaza*, 129 S. Ct. at 1464.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis ... the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* 153-54 (Cornell Univ. Press 1997). Similarly:

> The vast majority of ordinary, lower-and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 810 (2008). As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted).

The significant benefits that employees derive from arbitration are likely to disappear altogether if they are forced instead to submit to complex, class action litigation despite having agreed to waive both the judicial forum and class action procedures or risk having their rights adjudicated in their absence.

Invalidating an arbitration agreement in favor of a judicial class action despite unambiguous contractual language to the contrary also would undermine the efficiencies of arbitrating workplace disputes. Unlike the typical two-party arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend. *Cf. Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011). Even "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties ... thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation ....

Id. (citations omitted). Even more so would the shift from bilateral arbitration to class action litigation change the nature and substance of the proceeding beyond recognition.

Furthermore, the significantly higher costs and exposure posed by class actions place enormous pressure on defendants to settle rather than run even a small risk of catastrophic loss, what this Court in *Concepcion* described as "the risk of 'in terrorem' settlements ...." 131 S. Ct. at 1752. This increases greatly the potential for what some courts have called "judicial blackmail":

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing cases referring to the pressure on defendants to settle class actions as "judicial blackmail") (footnote omitted). These issues are even more acute in the context of arbitration, which by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Overriding an arbitration agreement that waives class action procedures, thus opening the door to class action litigation where the parties have agreed explicitly not to do so, would defeat one of the most mutually advantageous purposes of arbitration – lower-cost resolution of disputes.

As Chief Judge Jacobs pointed out in his dissent to the denial of rehearing *en banc*, the decision below "in the hands of class action lawyers, can be used to

challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause." Pet. App. 137a. Judge Jacobs' concerns apply equally to employment arbitration agreements. As Judge Jacobs foresaw, "[u]nder the panel opinion, arbitration must now begin in federal court – and be litigated there on the merits in many critical respects." Pet. App. 139a. The Second Circuit's ruling would send every case in which a party seeks to represent coworkers into court for a mini-trial on his prohibitive costs claim, however thin, despite his prior agreement to arbitrate.

Given that the primary purpose of employment arbitration agreements is to resolve employment disputes quickly and inexpensively, the Second Circuit's ruling creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR EXPERIAN INFORMATION SOLUTIONS, INC., AND CONSUMERINFO.COM, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Experian Information Solutions, Inc. ("Experian") is a nationwide consumer reporting agency that maintains credit files on more than 200 million consumers. ConsumerInfo.com, Inc. ("CIC") is a corporate affiliate of Experian that markets to consumers, and often enters into agreements with consumers that mandate arbitration of disputes and waive the ability to pursue claims as part of a class. Experian and CIC therefore have a strong interest in preserving individual arbitration as a streamlined, efficient, and cost-effective means of resolving disputes.

Experian and CIC have direct experience with the delay, inefficiency, and interference with arbitration occasioned by claims that class resolution is necessary to "vindicate" statutory rights. For instance, in *Johnson v. ConsumerInfo.com, Inc.*, the plaintiff consumers filed putative class-action lawsuits against CIC despite having contractually agreed to arbitration and waived class treatment. After a federal district court rejected their argument that class-action litigation was necessary to vindicate their state law statutory rights, and granted a motion to compel arbitration, multiple plaintiffs appealed to the Ninth Circuit, where the appeals have been pending for more than a year, *see Johnson v.*

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[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.

ConsumerInfo.com, Inc., No. 11-56520, *et al.*, and the arbitrations have not proceeded.

Given the plaintiffs' vindication-of-rights argument in *Johnson*, and the widespread use of such arguments by class-action lawyers in the wake of *Concepcion*, Experian and CIC have a strong interest in ensuring the recognition that (1) whatever scope the vindication-of-rights notion is given is inherently limited to federal statutory rights and cannot apply to state law rights, and (2) the vindication notion cannot empower courts to invalidate arbitration agreements on the basis adopted below—a judicial conclusion that class litigation (rather than individual arbitration) is essential to the vindication of a particular category of claims.

SUMMARY OF ARGUMENT

To the extent, if any, that a court may invalidate an agreement to arbitrate so as to "effectively vindicate" statutory rights, that vindication principle is necessarily limited to *federal* statutory rights, and, further, cannot be based (as the decision below was based) on a determination that individual arbitration is inadequate to vindicate the rights at issue.

I. Any vindication principle, if it exists at all, is limited to federal claims. All of this Court's cases suggesting even the possibility of a vindication exception to arbitration have invoked reasoning that is inherently limited to federal rights. The vindication principle is based on the idea that there may be circumstances in which another federal statute may override the mandate of the Federal Arbitration Act ("FAA"). But if a state statute is at issue, the requirements of the FAA necessarily prevail over state law. Thus, only the vindication of

federal claims could even theoretically overcome the FAA rule mandating enforcement of arbitration agreements.

II. Even for federal claims, there is no broad exception to the FAA for vindication of rights. The vindication-of-rights concept that was the basis of the Second Circuit's ruling below arose from cases that have since been discredited. In particular, the idea that arbitration could not sufficiently vindicate rights originated in cases like *Wilko v. Swan*, 346 U.S. 427 (1953), which has been overruled, and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974), which has been limited to its precise holding with its anti-arbitration reasoning firmly rejected. While a few more recent cases have mentioned the vindication idea, none has suggested that courts are empowered to determine—as the court below determined—that the individual arbitration contemplated by the FAA is inherently inadequate to the vindication of certain rights that (in the court's estimation) require class treatment.

Rather, only Congress can decide that arbitration does not suffice to vindicate certain types of claims. No such vindication exception can be derived from the FAA itself, because the FAA establishes, in mandatory language, the principle that—subject to specific exceptions spelled out in the FAA—arbitration does effectively vindicate claims. Thus, the only legitimate basis for a vindication exception to arbitration would be a contrary congressional command in some federal statute other than the FAA. And given the well-established rule that federal statutes should not be deemed in conflict unless absolutely necessary, there must be some particular

statutory language to overcome the dictates of the FAA. There is no such statutory language in the antitrust laws.

Moreover, even if the Court were to determine that there is room for a vindication doctrine with respect to affirmative obstacles created by an arbitration agreement (such as exorbitant arbitration fees), that principle could not be extended to permit the determination made below—that certain claims *require* class action litigation, such that individual arbitration is deemed inadequate to vindicate those rights. This Court's cases make clear that the FAA's endorsement of arbitration envisions *individual* arbitration. Accordingly, the FAA embodies a broad determination that individual arbitration *is* adequate to the resolution of all manner of disputes, and it denies judges the power to carve out areas in which (in their opinion) arbitration is deemed inadequate. The Second Circuit's determination that the claims at issue here cannot be adequately vindicated in individual arbitration is thus directly contrary to the FAA.

ARGUMENT

I. A "VINDICATION OF RIGHTS" EXCEPTION TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS EXISTS, IF AT ALL, ONLY WITH RESPECT TO FEDERAL STATUTORY RIGHTS.

In the aftermath of *Concepcion*, the "vindication of statutory rights" principle that was the basis of the decision below has become a favorite of class-action lawyers seeking to evade arbitration agreements that

preclude class proceedings.[2] As explained in detail below (*see infra* Point II), *amici* strongly agree with Petitioners that the FAA contains no implied exception for the vindication of statutory rights; that, to the extent, if any, that a vindication principle may arise from other, rights-creating federal statutes, the Second Circuit went far beyond what the FAA and this Court's cases permit; and, accordingly, that the judgment below must be reversed.

Amici first wish to make the preliminary point that, to the extent the Court considers recognizing any form of "vindication" principle in this case, it is important that it remain clear that—contrary to some arguments being made (and thus far uniformly rejected) in the wake of *Concepcion*[3]—any such principle must necessarily be limited to the vindication of *federal* statutory rights, and can have no application to rights based in state law.

First, all of the cases discussing (in *dicta*) vindication of rights as a possible exception to enforcement of an arbitration agreement concerned federal rights. *See Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (Truth in Lending Act claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (Age Discrimination in Employment Act claim); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

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[2] *See* Brief of the United States Chamber of Commerce, *et al.*, in Support of Petition for Writ of Certiorari at 6-8.

[3] *See, e.g., Homa v. Am. Express Co.*, 2012 WL 3594231, at *4-*6 (3d Cir. Aug. 22, 2012); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235-36 (11th Cir. 2012).

Inc., 473 U.S. 614, 628-29 (1985) (Sherman Act claim); *Gardner-Denver Co.*, 415 U.S. at 38 (Title VII claim); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 352 (1971) (claim for seamen's wages under 46 U.S.C. § 596). And this Court has explicitly referred to vindication of *federal* rights, not to all possible rights. *See Randolph*, 531 U.S. at 90 ("[T]he existence of large arbitration costs could preclude a litigant from effectively vindicating her *federal* statutory rights in the arbitral forum.") (emphasis added); *Mitsubishi*, 473 U.S. at 628 (arbitration agreements must be enforced by their terms "unless *Congress* itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue") (emphasis added).

Indeed, the entire theory, as articulated in these cases, turns on whether there is a *congressional intention* to override the FAA. As this Court explained in *Mitsubishi*, the FAA's directive to enforce arbitration agreements can be superseded only by another congressional enactment:

> Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

473 U.S. at 628. Even in this case, the Second Circuit expressly framed the issue as whether an arbitration clause was enforceable because it

"precluded [plaintiffs'] ability to vindicate their *federal* statutory rights." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) ("*Amex III*") (emphasis added).

The limitation to federal rights makes sense because only a conflicting federal statute could override the FAA. In contrast, if a state law conflicts with the FAA, the requirements of the FAA must prevail, because state statutes are necessarily subordinate to the federal policies expressed in the FAA. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). As this Court has explained, "in recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, . . . the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989). In short, the vindication notion can apply only if another *federal* statute conflicts with the FAA. It can have no application to state law claims.

II. THE EXPANSIVE "VINDICATION OF RIGHTS" PRINCIPLE ADOPTED BELOW CANNOT BE SQUARED WITH THIS COURT'S CASES APPLYING THE FAA.

Properly understood, this Court's cases offer little support for any vindication-of-rights doctrine that would override the FAA in the absence of an affirmative congressional intention to preclude arbitration for particular rights or classes of cases.

Moreover, to the extent there is room for a vindication of rights doctrine at all, it is necessarily limited to obstacles (such as excessive fees) that are created *by the arbitration agreement or procedures*. It cannot empower courts to strike down an arbitration agreement—as the Second Circuit did below—on the ground that the *nature of the claims* renders individual arbitration inadequate to the task. Indeed, that is the very sort of judicial determination the FAA was enacted to prohibit.

A. The roots of the vindication-of-rights idea make clear that there is no exception to arbitration simply because a court concludes that arbitration does not sufficiently vindicate certain rights.

This Court's *dicta* about vindication of rights are rooted in cases that are now discredited, and this Court's more recent cases have never applied the vindication concept to invalidate an arbitration agreement. Nor has this Court stated, even in those *dicta*, that the courts have free-floating authority to override the FAA whenever they are of the opinion that arbitration will be inadequate in a particular class of cases. The FAA itself contains no exception for such circumstances, and accordingly an agreement to arbitrate can be invalidated to "vindicate federal rights" only if another federal statute actually conflicts with the FAA.

The vindication idea first arose in Justice Harlan's concurring opinion in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971). *Arguelles* held that section 301 of the Labor Management Relations Act, which provides for the enforcement of grievance and arbitration provisions of collective-bargaining

agreements, did not abrogate, but merely added an optional remedy to, the remedy of 46 U.S.C. § 596, which permits seamen to sue for wages in federal court. *Id.* at 357. In his opinion, Justice Harlan reasoned that "the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum," and "where arbitration is concerned, the Court has been acutely sensitive to these differences." *Id.* at 359-60 (Harlan, J., concurring). For this idea, Justice Harlan relied upon *Wilko v. Swan*, 346 U.S. 427 (1953), where the Court "carefully analyzed" the effect arbitration would have on the substantive federal right at issue and "concluded that conflicting congressional goals would best be served by" construing the Securities Act as precluding waiver of a judicial forum. *Arguelles*, 400 U.S. at 360 (Harlan, J., concurring). Justice Harlan's "vindication" language was then quoted in *Gardner-Denver*, 415 U.S. at 56, which held that the prior submission of a Title VII claim to arbitration did not foreclose the employee from bringing the claim in court. The Court used this language immediately following its statement that "deferral to arbitral decisions would be inconsistent with" what the Court inferred was Congress's intention that federal courts "exercise final responsibility for enforcement of Title VII." *Id.*

These roots of the vindication idea make clear that it rests on principles that this Court has later rejected. To begin with, *Wilko* – the basis for Justice Harlan's original invocation of the idea that arbitration could not "vindicate" certain federal rights – has been overruled, on the ground that it was "pervaded by . . . the old judicial hostility to arbitration." *Rodriguez de Quijas v.*

Shearson/American Express, Inc., 490 U.S. 477, 480 (1989); *see also id.* at 481 ("To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."). The Court has likewise repudiated the broad anti-arbitration reasoning in *Gardner-Denver*:

> [A]part from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta that were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265 (2009). In short, the notion that vindication of federal rights empowers the courts to make their own assessment of whether arbitration is well suited to particular claims—and to invalidate arbitration agreements when their assessment is negative—is rooted in precisely the hostility to arbitration that the FAA, and this Court's modern case law, condemn.

Since *Gardner-Denver*, none of the cases discussing the vindication idea has held that courts can simply examine whether arbitration does an effective job of vindicating a particular kind of claim. In *Mitsubishi*, the vindication concept arose in the context of the concern that because "the international arbitral tribunal owe[d] no prior allegiance to the legal norms of particular states[,] . . . it ha[d] no

direct obligation to vindicate their statutory dictates." 473 U.S. at 636. Nonetheless, the Court recognized that the tribunal "should be bound to decide that dispute [regarding American antitrust law] in accord with the national law giving rise to the claim," *id.* at 636-37; *see also id.* at 637 n.19, and therefore "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.* at 637. Thus, "vindication" in *Mitsubishi* simply represented the arbitration panel actually considering the federal statutory claim, rather than applying other law.[4]

Indeed, earlier in the opinion, *Mitsubishi* held that a federal statutory claim would not be arbitrable only if the federal statute at issue expressed such an intention, stating that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Id.* Similarly, in *Gilmer*, this Court held that "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it

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[4] In *14 Penn Plaza LLC*, the Court used the term "vindication" in a similar fashion, to refer to a situation where a union might bar a plaintiff from bringing his claim in an arbitration. *See* 556 U.S. at 273-74 ("Respondents also argue that the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from effectively vindicating their federal statutory rights in the arbitral forum." (internal citations and quotation marks omitted)).

unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26 (emphasis added; quoting *Mitsubishi*, 473 U.S. at 628). In short, a federal claim cannot be arbitrated only if Congress expresses such an intention in a federal statute.

The same principle follows from *Randolph*. In *Randolph*, the court of appeals had "determined that the arbitration agreement failed to provide the minimum guarantees that respondent could vindicate her statutory rights" based on "'steep' arbitration costs." 531 U.S. at 84. This Court laid out the steps to decide the issue: "In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then ask *whether Congress has evinced an intention* to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 90 (emphasis added). In that case, the parties did agree and there was no intention expressed in the statute. *Id.* The Court went on to reject the plaintiff's argument that she was "unable to vindicate her statutory rights in arbitration" because she might "be required to bear prohibitive arbitration costs," holding that the record did not support this argument. *Id.* Accordingly, *Randolph* had no occasion to decide whether—and if so, under what circumstances—the cost of arbitration could preclude arbitrability. Nor did *Randolph* (or any of this Court's other cases) identify any source of authority for a court to invalidate an otherwise enforceable arbitration agreement on this ground.

In sum, any broad idea of vindication of rights as an exception to arbitration is based on a now-rejected

notion of hostility to arbitration, and this Court's modern arbitration cases have never endorsed free-floating judicial authority—in the absence of any congressional determination that a class of claims should not be arbitrated—to assess whether arbitration will adequately vindicate those claims.

B. The only legitimate source of a determination that arbitration cannot vindicate certain federal rights would be clear congressional intent in a federal statute other than the FAA.

The vindication principle does not and cannot come from the FAA itself, because the mandatory language of the FAA leaves no room for such an exception. Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added). Thus, the FAA makes clear that an arbitration provision is enforceable except upon grounds for revocation of any contract. The only exception that the FAA makes for a kind of claim is for "contracts of employment of seamen, railroad employees, or any other class of workers

engaged in foreign or interstate commerce," *id.* § 1, which demonstrates that Congress specified the claims to which it did not want the FAA to apply. It is Congress's role, not the role of the courts, to create exceptions to the FAA not mentioned in the statute. *See 14 Penn Plaza*, 556 U.S. at 270 ("Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable." (internal quotation marks omitted)).

Indeed, the entire premise behind the FAA is that arbitration can vindicate claims, and it is not the role of the courts to decide which claims are proper for arbitration and which are not. Supreme Court precedents "place it beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1749. The FAA represents an "emphatic federal policy in favor of arbitration." *Mitsubishi*, 473 U.S. at 631. "It requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal quotation marks and citations omitted).

Furthermore, the contrary congressional command must be something specific in the other statute expressing an intent not to allow arbitration, rather than a judicial determination that arbitration is not an adequate method for resolving certain claims. "[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of

arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza*, 556 U.S. at 269. Accordingly, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum." *Id.* In addition, there is no statute that authorizes courts to assess, case by case, how successfully arbitration might vindicate the rights at issue—and the mandate of the FAA is to the contrary. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 536 (1995) ("It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [party]."). Unless a statute specifically authorizes courts to assess case by case whether arbitration will adequately vindicate particular rights, such an inquiry has no foundation in law.

The requirement of some particular statutory language to overcome the dictates of the FAA is simply an application of the rule that federal statutes should not be deemed in conflict, so that one is ignored, unless absolutely necessary. "[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) (internal quotation marks omitted). Indeed, if arbitration is not allowed for particular claims, then it effectively repeals the FAA for application to those claims. And this Court has "repeatedly stated that absent a clearly expressed

congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (internal quotation marks and alterations omitted).[5] Thus, the FAA's rule requiring enforcement of arbitration provisions – subject to the limited exceptions of the FAA – applies to all claims unless another federal statute establishes an irreconcilable conflict with the FAA.

Here, there is no such conflict. The Second Circuit does not cite any language in the Sherman Act or the Clayton Act that supposedly conflicts with the FAA. *See Amex III*, 667 F.3d at 213 n.5 ("[T]he Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court . . . ."). *Mitsubishi* in fact concerned Sherman Act claims, and this Court noted "the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act." 473 U.S. at 628-29. Nonetheless, the Second Circuit held that "forcing plaintiffs to bring their claims individually here would make it impossible to enforce

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[5] *See also, e.g., JEM Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) ("Petitioners next argue that the PVPA altered the subject-matter coverage of § 101 by implication. Yet the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. The rarity with which the Court has discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (internal quotation marks, citations, and alterations omitted)).

their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute." 667 F.3d at 213 n.5. Thus, the only congressional language that supposedly creates a conflict is simply the existence of a private right of action. However, the existence of this right does not suggest congressional intent not to allow arbitration, let alone create the kind of clear conflict that would allow courts to ignore the FAA. Indeed, the Second Circuit's theory would support a finding that arbitration can conflict with congressional purpose for virtually all federal claims. But Congress made clear the only limitation on arbitration, and that limitation is the "any contract" exception, 9 U.S.C. § 2, not some amorphous idea of vindication of rights.

Moreover, a vindication doctrine is unnecessary to ensure that federal claims are not effectively precluded by onerous provisions in arbitration agreements. For example, onerous conditions (such as exorbitant fees) can be challenged when they are unconscionable, under the FAA's own exception for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. And, of course, Congress can provide that a particular class of claims does not fall within the FAA.

C. In all events, the courts are not empowered to invalidate arbitration on the ground that class litigation is essential to the vindication of the rights at issue.

The Second Circuit did not identify any defect in the arbitration agreement or procedures at issue in this case. Instead, it held, in essence, that individual arbitration was *inherently* inadequate to vindicate

the rights at issue, because (in the court's view) those rights can only be vindicated by class-action litigation. And the court relied on reasoning that threatens to extend to any small-dollar claim that might not be economical to litigate individually—the very sort of claim for which the informality and streamlined nature of arbitration can be most beneficial. For multiple reasons, the FAA places this sort of determination beyond the power of the courts.

1. First, such a determination—that individual arbitration is inadequate to vindicate certain classes of claims—is precisely what the FAA was passed to eliminate. It is important to recognize that a determination that class resolution is essential to the vindication of certain claims amounts to a determination that arbitration—not just the particular arbitration agreement at issue, but arbitration generally—is *not* adequate for such claims. As this Court has repeatedly made clear, the arbitration envisioned in the FAA is individual arbitration.[6] And therefore the FAA embodies a binding congressional determination that (absent a contrary determination in a different statute) individual arbitration *is* adequate to the resolution of *all* legal claims.

In particular, in *Stolt-Nielsen*, this Court held that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply

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[6] Parties are of course free to *agree* to class arbitration, but *Stolt-Nielsen* and *Concepcion* make clear that the FAA principally contemplates individual arbitration, and requiring class arbitration interferes with the goals of the FAA.

agreeing to submit their disputes to an arbitrator." *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). The Court explained: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution[,] . . . [b]ut the relative benefits of class-action arbitration are much less assured . . . ." *Id.* Thus, the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.* at 1776.

And in *Concepcion*, this Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. Moreover, "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" because "class arbitration is a relatively recent development." *Id.* at 1751 (internal quotation marks omitted). Indeed, class actions (let alone class arbitrations) for monetary relief were not available when the FAA was passed. *See* Pet'r Br. at 5. Given this history, and the fundamental differences in class arbitration that potentially undermine the goals of arbitration, class arbitration "is not arbitration as envisioned by the FAA." *Id.* at 1752.

Finally, the background understanding when Congress passes any statute is that arbitration is permissible, and thus it cannot be that the mere fact of arbitration is inconsistent with the statute. As this Court held in a very recent case, a statute passed against that background will not be deemed to reject arbitration without express language to that effect.

See CompuCredit, 132 S. Ct. at 672 ("At the time of the [Credit Repair Organizations Act's] enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity. . . . Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest."). Because courts cannot assume arbitration is insufficient to vindicate federal rights – and the background assumption in the FAA and federal statutes is that arbitration is individual arbitration – courts likewise cannot assume class arbitration is necessary for vindication.

In short, the Second Circuit's determination that individual arbitration is inadequate to the vindication of the antitrust claims in this case conflicts with the FAA's determination that individual arbitration *is* adequate, and amounts to precisely the type of determination the FAA was designed to supersede.

2. Furthermore, the judicial determination that the vindication of particular categories of rights requires class resolution usurps the role of Congress. It is Congress's role to determine whether certain kinds of claims require class action treatment rather than individual arbitration.

A class action cannot be deemed legally necessary unless Congress says so, because there is no legal basis in the first place to treat class actions as necessary to vindicate rights. The Second Circuit started with a flawed premise: "We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights." *Amex III*, 667 F.3d at 214. However, suitability is not the issue, but rather

whether class actions are a part of statutory rights, such that they allow courts to refuse to enforce arbitration agreements notwithstanding the FAA.

Class actions do not satisfy this test because there is no "right" to a class action. There are numerous reasons why a particular plaintiff can be barred from proceeding as part of a class even if he shows that is not economical for him to proceed individually. For example, if there are not many others similarly situated, if class representation is inadequate, if the claims have an element that must be decided individually, or if a class action would be unmanageable, then class certification may be denied.

Simply put, a class action is not an individual right, but a procedural tool. And the procedures for dealing with claims are not embedded into statutory rights unless the statute provides for such procedures. Indeed, the rules for class actions can (and have been) changed over the years, without any plausible argument that these changes unlawfully undermine statutory rights. This point is even clearer for state claims, because states have many different class action rules, and one state (Virginia) does not allow class actions at all. *See* American Bar Ass'n, *Survey of Class Action Law – 2010*, *available at* http://apps.americanbar.org/litigation/mo/premium-lt/articles/classactions/ClassActionSurvey2010.pdf. Thus, unless a statute explicitly gives a right to class treatment, the absence of a class action does not violate a person's right to vindicate his claim.

Furthermore, the procedural rules for arbitration are generally immune from scrutiny under the FAA. As this Court has held, "[a]rbitration under the FAA is a matter of consent," and "[j]ust as [the parties]

may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (internal citation omitted). Moreover, Congress limited judicial inquiry to the "any contract" exception specifically to avoid having courts require particular procedures based on hostility to arbitration. In particular, the idea that the class-action procedure is necessary for small claims is contrary to the FAA. If Congress wanted the FAA to be inapplicable to small claims – which is a significant portion of the claims that would go to arbitration – it would have said so. Indeed, under the Second Circuit's theory, the FAA would become inapplicable in many cases where arbitration is most worthwhile.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEFS

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AMERICAN EXPRESS COMPANY, ET AL.,

PETITIONERS

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The Second Circuit's approach to arbitration reflects an unfounded assumption about the role and value of class actions in our system of justice. It assumes that the class action device is always a necessary and desirable tool for resolving small-dollar statutory claims—so much so that federal law would invalidate any arbitration clause that does not allow for resolution of such claims on a class-wide basis.

But that approach ignores the many significant and unjustified costs imposed by the class action device and its many inadequacies as a tool for administering justice. In the face of those costs and inadequacies, it is no surprise that many parties to commercial contracts (including the merchants that are the plaintiffs in this case) choose to commit any and all disputes to arbitration on an individual, non-representative basis. And there is certainly no reason to conclude—as the Second Circuit did—that federal law precludes such a choice.

Amicus The Financial Services Roundtable ("FSR"), an association of the largest, most diversified providers of integrated financial services, has a strong interest in the resolution of this issue. FSR's member companies offer products and services to

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* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than The Financial Services Roundtable, its members, and its counsel made any financial contribution to the brief's preparation or submission. The parties have consented to the submission of this brief. Letters of consent from both parties are on file with the Clerk.

consumers and businesses in the banking, insurance, and securities sectors of the industry. The member companies are frequently targets of class actions, which require substantial resources to defend and which often impose costs that are entirely out of proportion to their merits. To address those concerns, FSR's members have sought to find alternative ways to resolve disputes that are more effective, are more responsive to plaintiffs, and reduce costs, while still compensating plaintiffs who have valid claims. To that end, many member companies have augmented their dispute resolution programs to include individual arbitration. FSR thus offers the Court a unique perspective informed by the experience of its member companies in both class litigation and individual arbitration.

FSR agrees with Petitioners that the decision below is wrong as a matter of doctrine. See Pet'r Br. 20-48. In this brief, however, FSR will focus on issues that the Second Circuit did not consider: the substantial monetary and economic costs of class actions, and the weakness of the class action device as a tool for administering justice.

In many instances, class actions may not provide any meaningful relief to the class but may instead serve only to enrich lawyers. Accordingly, it is far from clear that the class action is a better mechanism than individual, informal arbitration for providing relief to plaintiffs with legitimate claims. This is so whether the plaintiffs are individual consumers or, as here, merchants—either of whom may have the sorts of small-dollar claims that are particularly susceptible to class action abuse. Further, the class action device allows a single fact-finder to decide hundreds or thousands of debatable or weak claims on an all-

or-nothing basis, subjecting businesses like FSR's members to tremendous risk. This risk often forces settlements that bear little relationship to the merits of the claim. By taking this risk off the table through pre-dispute bilateral arbitration agreements, FSR's members are able to limit these costs and pass on some of the savings to their customers in the form of lower prices. For merchants such as those here, for instance, the benefit may come in the form of lower fees.

As Petitioners explain, Congress has not mandated the availability of the class action mechanism in any of the statutes at issue. See Pet'r Br. 22-24. In fact, Congress's relevant pronouncements cut the other way. For example, in passing the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, ("CAFA"), Congress recognized the flaws of class actions. Bilateral arbitration agreements are a valuable and legitimate tool to limit those flaws and reduce the costs of dispute resolution.

It is certainly rational for parties to commercial contracts to choose in advance to resolve all disputes in bilateral arbitration—and no principle of federal law or statutory interpretation prevents them from doing so. Consistent with Congress's explicit endorsement of arbitration in the Federal Arbitration Act, the Court, as it has in many other contexts, should "enforce [the] agreement[] to arbitrate according to [its] terms." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012).

STATEMENT

Petitioner American Express markets both charge cards and credit cards. Pet. App. 5a. Merchants who choose to do business with Petitioner with respect to

one type of card must accept Petitioner's other cards as well. *Id.* at 6a.

The contracts these merchants sign with Petitioner contain a mandatory arbitration clause. The clause provides for only bilateral arbitration; it states that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity * * * *" *Id.* at 9a. Thus, the agreement prevents merchants from proceeding on a classwide basis, whether in litigation or in arbitration. *Ibid.*

Despite this agreement, respondents brought this action under the Sherman and Clayton Acts, seeking to represent a class of "merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards * * * *" *Id.* at 4a.

Petitioners moved to compel arbitration. The district court granted the motion, holding that it was for the arbitrator, not the court, to decide the enforceability of a bilateral arbitration agreement. *Id.* at 10a.

The Second Circuit reversed, in a decision that was later vacated and remanded by this Court with instructions to reconsider in light of *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). On remand, the Second Circuit again reversed, finding that "*Stolt-Nielsen* did not require [the court] to depart from [its] original analysis." Pet. App. 13a-14a. After the Second Circuit issued its second opinion, this Court decided *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), which held that a state law rule of unconscionability could not be

used to preclude waivers of class arbitration. The Second Circuit responded by issuing a third opinion, again adhering to its original holding. It is this decision that is now under review.

The Second Circuit held that on the record presented, requiring the plaintiff to arbitrate individually would "preclude [Plaintiffs'] ability to vindicate their federal statutory rights."[1] Pet. App. 15a. And because the parties did not agree to class arbitration, the court held that the class action would proceed in court. *Id.* at 30a. The court distinguished *Concepcion* and *Stolt-Nielsen*, holding that these decisions did not "require that all class action waivers be deemed per se enforceable." *Id.* at 18a. Rather, said the Second Circuit, when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 22a. (internal quotation marks and citation omitted). The Second Circuit then went on to hold that Respondents had met that burden.

In so holding, the Second Circuit relied on an affidavit from Respondents' expert to conclude that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id.* at 27a. Even treble damages, the court reasoned, would not be enough to recover the necessary litigation costs. *Ibid.*

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[1] Neither party has challenged the court's holding that the enforceability of the agreement is a matter for the court, not the arbitrator.

Chief Judge Jacobs, joined by Judges Cabranes and Livingston, dissented from the denial of rehearing en banc. First, the dissent emphasized the breadth of the panel decision, pointing out that now "every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss." *Id.* at 137a. Second, the dissent observed that adjudicating the enforceability of bilateral arbitration clauses would now require estimating the expense of litigation—an analysis inseparable from the merits, resulting in further cost and delay.

SUMMARY OF ARGUMENT

Agreements to arbitrate are contracts, and they should be enforced according to their terms unless Congress has spoken to the contrary. *CompuCredit*, 132 S. Ct. at 669. In this case, Congress has given no contrary direction. Further, given the potential for abuse in class actions and the significant costs they impose, it is easy to see why Congress has never prohibited private parties from adopting arbitration clauses that require resolution of disputes on an individual basis.

First, and critically, Congress itself has spoken to the double-edged nature of class actions. In passing the Class Action Fairness Act (CAFA), Congress recognized that class actions may fail to compensate class members and can be used to subject defendants to tremendous settlement pressure, regardless of the merits of the claim.

Second, even after CAFA, class actions continue in many instances to fail to compensate both individual

class members and the class as a whole. Class actions are, of necessity, mass produced. Without considering individual circumstances, it may not be possible to ensure that each class member receives appropriate compensation.

Further, in many instances class actions serve only to compensate lawyers while failing to provide meaningful compensation for the class as a whole. This problem is particularly acute for small-dollar claims, whether brought by individual consumers or merchants, like the plaintiffs here. And it occurs in part because CAFA did nothing to address *cy pres* settlements, in which part or all of the award is donated to charity rather than given to compensate class members. These settlements can easily be used to benefit counsel and third parties at the expense of the defendant as well as the class.

Third, even after CAFA, class actions can be—and often are—used to extract significant settlements for meritless claims, driving up prices for all.

Fourth, class actions impose a tremendous burden on the federal courts, and that burden delays the availability of meaningful relief to both class members and defendants. That burden can be alleviated by voluntary use of bilateral arbitration.

Nor is there any unfairness in enforcing an agreement prohibiting class arbitration. Parties who sign a bilateral arbitration agreement (and thus agree not to litigate on a class-wide basis) make a rational choice to forgo a flawed tool that delays resolution of their individual claims and hardly guarantees them a meaningful recovery, in exchange for a substantial benefit—in the form of lower prices and access to speedier resolutions through individual ar-

bitration. Congress has not precluded such a decision, and neither should the courts.

ARGUMENT

I. Like all parties to arbitration agreements, the Petitioners are entitled to the benefit of their bargain.

An arbitration agreement is a contract, like any other. *AT&T Mobility LLC*, 131 S. Ct. at 1745. As such, it is the product of choices made by the contracting parties. Where, as here, Congress has not spoken to the contrary, the contract should be enforced. Indeed, when the parties, through a contract, weigh the costs and benefits of a difficult decision, a court should be particularly reluctant to substitute its own judgment for that of the parties.

That was the principal rationale for the Federal Arbitration Act, which was driven by a "preeminent concern * * * to enforce private agreements into which the parties had entered." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Congress, moreover, *could* have stepped in to preclude the parties from waiving the class action mechanism, had it wished to do so. See *CompuCredit*, 132 S. Ct. at 669 (noting that FAA's mandate can be "overridden by a contrary congressional command"). But as Petitioners persuasively explain, Congress has chosen to leave that decision to the parties. See Pet'r Br. 23-24 (explaining that the Sherman Act cannot be read to require the availability of class actions).

This, moreover, is the very kind of situation where it makes sense to "enforce agreements to arbitrate according to their terms," as courts are required to do. *CompuCredit*, 132 S. Ct. at 669. The decision

whether to waive the class mechanism and commit to individual arbitration is a decision that calls for a weighing of competing costs and benefits. The Second Circuit addressed only one side of the equation, noting that class actions make it more feasible for plaintiffs, including the merchants here, to bring small claims. Pet. App. 18a-19a. As explained below, however, other considerations weigh heavily against class actions. And on balance, the parties to an arbitration agreement such as this one have decided that the costs of class litigation outweigh the benefits. The judicial branch should respect their choice and it should not presume that Congress intended otherwise.

II. Given the risks, costs, and potential for abuse inherent in the class action mechanism, it is easy to see why Congress has never precluded bilateral arbitration agreements.

The Second Circuit's refusal to respect the choices of the contracting parties—along with its implicit assumptions about Congress's intent—reflects that court's failure to grapple with the complex nature of class litigation. The court failed to consider several drawbacks of class litigation, which Congress itself has recognized in other contexts, and which explain why Congress has never mandated the availability of class actions in every statutory setting, even where potential damages are small.

A. Congress has recognized that class actions are imperfect devices that sometimes fail to compensate plaintiffs and drive up prices.

Congress's policy toward class actions is perhaps best reflected in CAFA, which greatly expanded fed-

eral jurisdiction over interstate class actions. See, *e.g.*, *Hollinger* v. *Home State Mut. Ins. Co.*, 654 F.3d 564, 569 (5th Cir. 2011) ("CAFA greatly expands federal jurisdiction over interstate class action lawsuits."). By doing so, Congress lessened the power of state courts to certify classes that would not qualify for certification under federal Rule 23. See Kalee DiFazio, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 Suffolk J. Trial & App. Advoc. 133, 137-140 (2012) (giving overview of the problem). Indeed, CAFA represents a congressional judgment that, while "[c]lass action lawsuits are an important and valuable part of the legal system," Pub. L. No. 109-2 § 2(a)(1), they have many drawbacks. These drawbacks were articulated in the Senate Report accompanying the legislation, and they can be grouped into two broad categories: shortcomings that hinder plaintiffs' ability to vindicate their rights, and shortcomings that hinder defendants' ability to protect theirs.

1. On the plaintiff side, Congress recognized the divergence between the interests of the class and the interests of class counsel, noting that it is not uncommon for "the attorneys [to] receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep. 109-14 at 14 (2005) (hereinafter "CAFA Report"). See also Pub. L. No. 109-2 § 2(a)(3) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such has where—(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value"). It hardly serves the public good to turn a dispute between two parties into a golden egg for a third—plaintiffs' counsel. Indeed, if a business is forced to pay more to a

third party, the prices it charges for its goods and services will inevitably go up. While higher prices and fees may be justified in the name of compensation to plaintiffs with valid claims, they are hardly justified in the name of payments to lawyers.

Unfortunately, the Senate Report was able to identify several cases where lawyers were the principal beneficiaries of class actions. For instance:

- **Microsoft Antitrust Case.** In one of the many "coupon settlements" outlined in the Report, consumers received a voucher good for a small rebate off of a future purchase—but only if the voucher was mailed in along with a receipt and UPC code. Further, half of the unclaimed settlement money was used to donate Microsoft products to schools rather than provide benefits to aggrieved consumers. CAFA Report at 16.

- **Bank of Boston Case.** This settlement provided consumers with up to $8.76 each—but provided class counsel with $8.5 million in fees. *Id.* at 14.

- **Firestone Case.** This settlement provided class counsel with $19 million in fees, while Firestone agreed to redesign its tires (which it was already in the process of doing) and develop a consumer education program. The class got nothing. Notably, the settlement was negotiated and approved in state court after a federal court of appeals rejected class certification. *Id.* at 15-16.

These examples, as well as the others in the Report, make clear that it is anything but a foregone conclusion that the class action mechanism will permit a plaintiff to vindicate his or her rights. True, no system of justice is perfect; individual litigation sometimes allows contingent-fee lawyers to collect

large fees for little work. But as the Report noted, the risk of undercompensation to class members at the expense of lawyers is "particularly pronounced" in class actions such as this one, where each plaintiff "has only a small financial stake in the litigation" and thus lacks incentive to monitor the case. *Id.* at 33.

Given this inherent problem in the class action device—particularly for small claims—it is easy to see why Congress has not precluded plaintiffs' efforts to take ownership over their rights in advance by committing to bilateral arbitration.

2. Congress recognized that class actions could be unfair not only to plaintiffs, but to defendants too—and that such unfairness had ripple effects on the greater economy. As Congress declared, CAFA was intended to "benefit society by encouraging innovation and lowering consumer prices." Pub. L. No. 109-2 § 2(b)(3). The Report observed that CAFA's remedy was needed because "many state court judges are lax about following the strict requirements of Rule 23 (or the state's parallel governing rule)." CAFA Report at 14. This was problematic in part because certification creates pressure on defendants to settle, regardless of the merits of the suit.

Unwilling to countenance such a practice, the authors of the Report delivered a stinging rebuke to "the use of the class device as 'judicial blackmail' in cases that border on frivolous." *Id.* at 20. See also Pub. L. No. 109-2 § 2(a)(2) (referencing "abuses of the class action device that have—(A) harmed * * * defendants that have acted responsibly"). For instance, two insurance companies "settled a lawsuit over a long-standing industry-wide practice of rounding insurance premiums up to the nearest dollar for nearly $36

million, *even though the premiums were calculated according to specific instructions from the Texas Department of Insurance.*" CAFA Report at 21 (emphasis added).

Defendants pay such settlements because the class mechanism significantly increases their risk at trial. If, as is often the case, the merit of a claim is debatable, a defendant sued by individual claimants will win some cases and lose some cases. Indeed, since juries are unpredictable, this can be true even if a claim "border[s] on frivolous." But in the class action context, the claims are bundled together, and litigation becomes an all-or-nothing proposition. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). The result is an "exorbitant inflation of penalties." *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting). As Congress has recognized, these risks are built into the price of the defendant's product or service. CAFA Report at 14 (noting that "corporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices"); 30 (noting that "such abuses hurt consumers by resulting in higher prices"); Pub. L. No. 109-2 § 2(b)(3) (stating intent to "benefit society by encouraging innovation and lowering consumer prices").

Simply put, Congress made clear in the deliberations leading up to CAFA that in certain situations, the class action may do more harm than good. With that as a backdrop, there is simply no basis to presume—as the Second Circuit did—that federal law would necessarily disapprove of arbitration clauses that make class actions unavailable.

B. Even after CAFA, class actions may not vindicate the rights of class members who have meritorious claims.

CAFA did not entirely eliminate the flaws of the class device. Indeed, these flaws cannot be entirely eliminated without abolishing the class device entirely, which CAFA made no attempt to do. The bundling of numerous claims, inherent in the very nature of the class suit, brings both benefits and drawbacks. And the availability of class actions for the pursuit of small-dollar claims can likewise cut both ways. In CAFA, Congress simply attempted to limit the class action device to appropriate cases by expanding federal jurisdiction.

Accordingly, even in the post-CAFA world, class actions may still fail to vindicate the rights of class members for at least two reasons. First, class action resolutions, by their nature, are not tailored to individual circumstances. Second, *cy pres* settlements, which were not addressed by CAFA, create an illusory recovery for the class—but can still create a very real recovery for class counsel and a real and significant cost for defendants.

1. Class actions resolve the claims of absent class members at wholesale, without considering the circumstances that make each case unique. Frequently, class actions settle for a lump sum that gives no consideration to the individual context of each member's harm. In these cases, the only attention paid to absent class members is the mailing or publication of the notice. In other cases, individual recoveries may vary, but they may have a cap or a floor. Finally, even in the most complex of cases, the sheer burden on the claims administrator is likely to prevent full

consideration of an individual's claims. Accordingly, in all of these situations, some class members are likely to be undercompensated, while other class members are likely to be overcompensated—even if the class as a whole receives an adequate recovery.

By contrast, bilateral arbitration allows for individual circumstances to receive direct, specific attention from the arbitrator. Congress could not have intended to preclude such an outcome—not after finding that class actions fail to benefit class members where "unjustified awards are made to certain plaintiffs at the expense of other class members." Pub. L. No. 109-2 § 2(a)(3)(B).

2. In any event, the class as a whole may be undercompensated, at least relative to counsel, as a result of a *cy pres* settlement. In a *cy pres* settlement, part or all of the money is awarded to non-profit organizations. In theory, this remedy serves to "put the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class." *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

But the reality falls short in three respects. First, even when *cy pres* is limited to unclaimed funds, "courts have awarded *cy pres* distributions to myriad charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." *Id.* at 1038-1039. Second, *cy pres* distributions sometimes represent the only relief in a settlement—leaving the class with nothing. Third, *cy pres* distributions can be used to set a floor on the settlement fund, forcing defendants to pay a certain amount even if only a small sum is claimed.

The latter two phenomena are particular concerns in small-dollar cases. Whether such a claim belongs to a consumer or a merchant, it may not be worth the claimant's attention. And class members may be so numerous as to be unidentifiable. Indeed, one commentator has written that "[c]y pres creates the illusion of class compensation. It is employed when—and only when—absent its use, the class proceeding would be little more than a mockery" Martin H. Redish et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623, 666 (2010) (condemning the doctrine's performance of "unconstitutional alchemy by effectively transforming the underlying substantive law from a compensatory remedial model into a civil fine").

Further, the use of *cy pres*—whether as a floor or as the sole relief—allows class actions to enrich third parties at the expense of class members and defendants. Indeed, it has been said that "one of the primary effects, if not purposes, of class action cy pres is to inflate the size of class attorneys' fees." *Id.* at 640. When *cy pres* is used to set a minimum payout, class counsel's compensation can still be calculated based on the entire settlement fund, resulting in a sizable fee award even if the class recovers little. But any payout will ultimately serve to drive up prices for the defendant's product or service. And a payout that does not benefit those with valid claims cannot be justified as a policy matter.

These are not abstract concerns. Several recent class action settlements employed the *cy pres* remedy and, consequently, served more to enrich lawyers and other third parties than to compensate class members:

- **Mead Johnson Baby Formula Case.** In one case, Mead Johnson allegedly "falsely represented that its Enfamil LIPIL was the only baby formula containing two fatty acids that promote brain and eye development in infants." *Nelson* v. *Mead Johnson & Johnson Co.*, No. 11-15956, 2012 WL 2947212, at *1 (11th Cir. Jul. 20, 2012). Under the settlement, class members could choose between $6-$12 in cash and 1-2 containers of product. *Ibid.* The agreement sets a minimum class payout of $8 million; should claims paid total less than $8 million, "the remainder shall be paid in Mead Johnson products to appropriate charities." *Id.* at *2. Counsel was awarded $3.64 million. *Id.* at *5.

- **Babies R Us Antitrust Case.** In this case, Babies R Us allegedly required all retailers to sell certain goods at or above a minimum resale price. *McDonough* v. *Toys "R" Us, Inc.*, 834 F. Supp. 2d 329, 333 (E.D. Pa. 2011). Claimants who were unable to submit a valid proof of purchase would receive just $5. (Claimants who could submit a valid proof of purchase could recover twenty percent of the purchase price.) *Id.* at 351-352. As of the date of the final fairness hearing, there had been approximately 41,000 claims. *Id.* at 341. As the court acknowledged, if 45,000 claimants each received 20% of a $300 baby product, and treble damages, the total award would be $8.1 million. *Ibid.* But the settlement fund was $35.5 million, with the unclaimed portion to be distributed *cy pres*. *Id.* at 351. Class counsel earned over $11 million in fees. *Id.* at 340.

- **Heartland Data Breach Case.** In another case, Heartland Payment Systems, Inc. was the victim

of a security breach, in which hackers "obtained confidential payment-card information for over one hundred million consumers." *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1047 (S.D. Tex. 2012). Although the settlement fund for consumer claims was $1 million, there were only 11 valid claims, for a total of (at most) $1,925. *Id.* at 1075. The remainder of the settlement fund was distributed to certain non-profit organizations, *id.* at 1076, with lawyers receiving over $600,000 in fees, *id.* at 1089.

- **Vitamin C Antitrust Case.** In this case, a group of Vitamin C manufacturers allegedly "conspired to fix the price of vitamin C at non-competitive levels and to limit the supply of vitamin C for export to the United States." *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 5289514, at *1 (E.D.N.Y. Oct. 23, 2012). The indirect purchaser class was allocated $1 million of the settlement fund. The class was told that "because there are millions of class members of the Indirect Purchaser Damages Class, a direct cash distribution to Indirect Purchaser Damages Class members is not practical. Instead, settlement funds will be distributed on behalf of the Indirect Purchaser Damages Class to charitable, not-for-profit, or governmental organizations approved by the Court." *Id.* at *2. The court approved this plan, noting that it was "unclear how these purchasers could be identified in any principled or consistent way since the vast majority of them likely did not retain receipts or other proof of their purchases." *Id.* at *7.

- **Netflix Privacy Case.** In another case, Netflix allegedly retained certain consumer information after the consumers quit the service. But the aggrieved consumers will not receive a dime. The settlement web site candidly informs class members that instead, "[t]he settlement fund will be used to make donations to not-for-profit organizations. Class members will not receive payments." *Commonly Asked Questions: How much will I receive?* (2012). The settlement still awaits final approval; a fairness hearing was held on December 5, 2012.

- **Facebook Privacy Case.** Another recent case involved Facebook's alleged sharing of information about members' transactions, without member consent, through its Beacon program. The aggrieved members received nothing. Class counsel received $3 million, and approximately $6.5 million was used to fund a charity organization related to online privacy—with Facebook taking a seat on the organization's board. The Ninth Circuit approved the settlement. *Lane* v. *Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012). In dissent, Judge Kleinfeld wrote that "[t]his settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class." *Id.* at 826.

These abuses persist despite judicial oversight of class settlements. Although judges no doubt attempt to scrutinize proposed settlements to the best of their ability, they have only limited information with which to do so. The plaintiff and the defendant join forces to present settlements in the best possible light. And while an objecting class member can inject

an adversarial presence into the proceeding, the objector (like the court) lacks much relevant information. Indeed, it may not have access to the parties' evidence or discovery—if there has been any discovery. See generally Richard Frankel, *The Disappearing Opt Out Right in Punitive Damages Class Actions*, 2011 Wis. L. Rev 563, 617-618.

In sum, as Congress has recognized, "[c]lass members often receive little or no benefit from class actions," Pub. L. No. 109-2 § 2(a)(3). What is more, the specter of potential class liability for questionable and meritless claims drives up the business's cost and prevents the business from offering the market benefits it could and (particularly with market pressure) would otherwise provide. Cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (stating that "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"); *IFC Credit Corp.* v. *United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008) ("As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration*, 2001 J. Disp. Resol. 89, 91 ("Assuming that consumer arbitration agreements lower the dispute-resolution costs of businesses that use them, competition will (over time) force these businesses to pass their cost-savings to consumers.").

For these reasons, a party to a contract might well wish to commit to pursuing his claim in bilateral arbitration, in exchange for a benefit in the form of reduced prices and a quicker resolution in the event

of a dispute. There is no reason to believe that Congress would stand in the way—not after declaring in CAFA that by reining in abusive class actions, it intended to "benefit society by encouraging innovation and lowering consumer prices." Pub. L. No. 109-2 § 2(b)(3).

C. Even after CAFA, class actions can be used to place defendants under intense pressure to settle, regardless of the suit's merit.

CAFA may have stemmed the proliferation of "blackmail" settlements, but the problem remains inherent in the class action device. While it is beyond dispute that a plaintiff who has been legally wronged should be compensated, it is equally beyond dispute that not all claims are meritorious.

And in the class context, actual merit matters little. The mere risk of liability to a class—and with it, bankruptcy—can create "hydraulic pressure to settle, even for claims defendants deem non-meritorious." *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 335 n.4 (3d Cir. 2011) (Scirica, J., concurring). See also *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."); 1998 Advisory Committee Note to Fed. R. Civ. P. 23(f) ("An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); Pet'r. Br. 53 (recognizing the problem).

Businesses, moreover, have only limited control over this resulting expense, because they cannot control whether or not they are accused of meritless

claims. As the Petitioner points out, class actions are often spearheaded by plaintiffs' lawyers whose interests may not be aligned with the class. See Pet'r Br 54. While counsel's incentives can increase the number of meritorious suits, it no doubt increases the number of meritless ones as well. Indeed, one Court of Appeals, sitting en banc, recently held that Rule 23 does not require that a class be limited to those who have a colorable legal claim, at least in the settlement context. *Sullivan*, 667 F.3d at 297. Thus, Rule 23 arguably continues to permit the certification of a nationwide class bringing claims under state law, even when some states would not provide a cause of action at all.

In light of the potential liability risks, businesses are left with only two options, each injurious to society: cease any activity that could potentially give rise to class action liability (see Pet'r Br. 54), or raise prices to compensate.

D. Class actions consume a tremendous amount of judicial resources.

The costs of class actions are not limited to plaintiffs and defendants; they extend to the courts as well. Judicial time is a very precious commodity. The federal courts saw 427 new civil cases per authorized judgeship in 2011, up from 380 in 2007. Administrative Office of the United States Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 16 (2012). And class actions demand a disproportionate share of that commodity. According to one study conducted in the late 1980s, a single case styled as a putative class action demands 4.7 times as much time as the average case—more than any other kind of civil case except

capital habeas. Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 22 (1996).

Moreover, in the federal courts at least, class actions are on the rise. One study compared class action activity in the period from January to June 2007 with the period from July to December 2001—and found a 72% increase in such activity. Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 3 (2008).

In addition to its obvious impact on the courts, the costly and time-consuming nature of class actions has a natural consequence that directly impacts litigants: class actions take a long time to deliver any kind of relief. According to the 1996 Willging study, class actions took two to three times as long to resolve as other civil cases in three of the four districts studied. Willging (1996) at 19. And according to another study, consumer class actions in federal courts averaged more than three years from inception to settlement. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 820 (2010).

By contrast, according to a study of 301 consumer arbitrations administered by the American Arbitration Association, the average time from filing to final award was just 6.9 months. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 845 (2010). This speed is accompanied by meaningful relief for consumers; one study found that

consumers obtain relief in arbitration more than half the time. See Pet'r Br. 52 & n.21 (citing studies). Small-dollar claims brought by merchants would play out much the same way.

Accordingly, it is easy to see why Congress has not precluded parties to commercial contracts, whether merchants or individual consumers, from choosing the speedier alternative of bilateral arbitration, given Congress's stated intent to "assure fair and prompt recoveries for class members with legitimate claims." Pub. L. No. 109-2 § 2(b)(1).

CONCLUSION

Class actions are not a magic bullet. Far from it; there is no guarantee they will fairly vindicate the rights of class members. And they come at a high cost—to the courts, businesses, and the economy as a whole. Congress has recognized and sought to combat both of these problems. It has never expressed any intent to preclude private parties from doing the same. Accordingly, the Second Circuit's decision should be reversed, and the parties' agreement should be enforced as written.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

In The
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, et al.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, on behalf of itself and all similarly situated persons,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE FOOD MARKETING INSTITUTE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE FOOD MARKETING INSTITUTE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE[1]

The Food Marketing Institute ("FMI") is a national trade association representing large, multi-store chains, regional firms and independent operators both in the United States and internationally. FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly $650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members. FMI is a not-for-profit corporation located in Arlington, Virginia and has no parent companies. No publicly-held company

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of amicus curiae briefs.

owns a ten percent (10%) or greater ownership interest in FMI.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry with more than 25 million employees and generated sales of over $2 trillion.

The FMI and NRF (together, "Amici") are uniquely situated to provide perspective to the Court regarding the benefits of the Second Circuit's ruling in upholding the effective-vindication rule, and the practical negative impact of a reversal. The businesses that Amici represent not only serve as merchants, but also as employers, purchasers and business partners. As such, arbitration provisions are contractually standard and vitally important to Amici's members in employment contracts, as well as agreements with customers, vendors and other business partners. At the same time, Amici's members are themselves purchasers of goods and services and recognize the need to protect their ability to vindicate their rights in arbitration and private litigation. Amici in particular recognize the importance of protecting the ability of businesses to vindicate rights under the federal antitrust statutes. Large and small businesses alike have served as direct purchaser plaintiffs in some of the

more prominent recent federal antitrust matters, including litigation involving the payments card industry.[2]

SUMMARY OF ARGUMENT

This Court has long recognized the importance of the effective-vindication rule as articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000). The Second Circuit's application of the effective-vindication rule was narrowly focused on the facts of this litigation before it and should not be read any more broadly than for the proposition it holds – that the Petitioner cannot enforce an arbitration clause that would impose prohibitive costs "preclud[ing] a litigant . . . from effectively vindicating her federal statutory [antitrust] rights in the arbitral forum." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 214 (2d Cir. 2012) (quoting *Randolph*, 531 U.S. at 90) ("*Amex III*").

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[2] *See, e.g., In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-md-1720 (E.D.N.Y.) (preliminary settlement approved providing for industry-wide revisions of Visa's and MasterCard's point-of-sale rules and $7.2 billion in damages); *In re K-Dur Antitrust Litig.*, No. 01-cv-01652 (D.N.J.) (antitrust challenge to a reverse payments agreement, for which a writ of certiorari is pending before this Court); *In re Mushroom Direct Purchasers Antitrust Litig.*, No. 06-cv-00620 (E.D. Pa.) (antitrust action seeking to hold country's largest mushroom cooperative liable for price-fixing); *In re Processed Eggs Products Antitrust Litig.*, No. 08-md-2002 (E.D. Pa.).

The ruling below struck an appropriate balance between the pursuit of federal antitrust claims and the protection of parties' rights to enforce arbitration provisions. The Second Circuit's narrow ruling allows Respondents to prosecute the complex allegations of anticompetitive conduct brought in the first instance, applying its ruling quite specifically in the antitrust context. There is strong judicial deference to the benefits of private enforcement of the antitrust laws, particularly in complex antitrust settings involving significant monetary damages. It is uncontested that enforcement of the American Express arbitration agreement as written – in particular its collective action waiver – will grant Petitioners *de facto* immunity from private federal antitrust damages liability. While arbitration is an often necessary as well as effective tool, and one used regularly by Amici's members, particularly in the employment context, prohibitive arbitration that does not allow one party the appropriate opportunity to fairly assert rights under federal antitrust law is not the intent of the Federal Arbitration Act ("FAA").

A reversal of the Second Circuit could have unforeseen negative consequences on the use of arbitration by businesses to resolve disputes. Businesses, such as those represented by Amici, enter into arbitration agreements as both the contractor and contracted, in the pursuit of an efficient, yet informal forum in which to resolve disputes. A reversal of the Second Circuit's decision will deny parties the ability to effectively vindicate rights through arbitration by

strict enforcement of exculpatory contract terms. This undermines the purpose of the arbitral process and will have a substantial chilling effect on the willingness of businesses and other parties to enter into arbitration agreements. Likewise, it will jeopardize the arbitration programs used by Amici's members as their employees, customers, and business partners will no longer have faith in the arbitral process.

Businesses have ready means to construct arbitration agreements that allow parties to vindicate their rights without undermining the arbitration process. The Second Circuit's ruling encourages the use of such arbitration agreements, which, in turn, promotes arbitration and ensures the vitality and legitimacy of the arbitral forum. A reversal of the Second Circuit would inevitably encourage the exact opposite – mass adoption of draconian, American Express-styled arbitration agreements as a means to exculpate wrongdoing. Such a result is particularly perverse in the antitrust context, as parties with market power will use that power to implement arbitration agreements that insulate them from any effective challenge under the antitrust laws.

ARGUMENT

I. THE EFFECTIVE-VINDICATION RULE STRIKES AN APPROPRIATE BALANCE BETWEEN VINDICATING RIGHTS UNDER FEDERAL ANTITRUST LAWS AND PROTECTING THE ENFORCEMENT OF ARBITRATION PROVISIONS.

While recognizing the important jurisprudence of arbitration, the Second Circuit found that the class action waiver in American Express's arbitration agreement was unenforceable as it precluded the Respondents' ability to effectively vindicate their rights under the federal antitrust statutes. This holding embraces the balance between meeting the goals of the FAA in promoting arbitration and upholding the vitally important statutory antitrust rights of private parties and should be upheld.

A. The Effective-Vindication Rule Is Consistent With The Objectives Of The Federal Arbitration Act.

This Court has long recognized the effective-vindication rule as an essential safety valve to the FAA's broad mandate that arbitration agreements are to be enforced as written. *See Mitsubishi,* 473 U.S. at 637; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). The effective-vindication rule, as applied by the

Second Circuit in this case, is easily squared with the FAA's pro-arbitration aims. The FAA reflects a federal policy of actually arbitrating claims. It does not reflect a policy of eliminating claims, or immunizing a party from litigation when such an arbitration agreement bars the opportunity to litigate and precludes the ability to vindicate claims in the arbitral forum.

Furthermore, the Second Circuit's ruling does not prohibit arbitration on federal statutory claims as Petitioners and several of their supporting amici suggest. *See, e.g.*, Pet. Br. 39-40. Rather, the Second Circuit found that its decision does not impact the typical case, where a party's statutory rights can be effectively vindicated through arbitration. Nor would the doctrine invalidate agreements on the grounds that they simply decrease the incentives for claimants to prosecute cases and enforce federal statutes. So long as claimants are not *entirely stripped* of the means to pursue their claims, the FAA's goal of promoting arbitration as a viable and respected alternative to litigation is furthered by the enforcement of arbitration agreements according to their terms.

The effective-vindication rule clearly does not undermine the policies of either the federal antitrust statutes or of the FAA – in fact just the opposite. It upholds the FAA's goal of valid arbitration while also encouraging the goal of private prosecution of anti-competitive claims.

B. The Effective-Vindication Rule Is Consistent With The Objective Of The Sherman Act.

For the last century, private antitrust enforcement has been a critical check against anticompetitive conduct. *See Rowland v. California Men's Colony*, 506 U.S. 194, 208 (1993) ("there is a public interest aspect to any private suit for treble damages under the antitrust laws); *see also Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) ("private suits are an important element of the Nation's antitrust enforcement effort"); *see also* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U. San Francisco L. Rev. 879 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661. Antitrust regulation "ensures that markets remain competitive" thus "the vindication of rights doctrine can be justified on instrumentalist grounds" by ensuring the private enforcement of the antitrust laws. David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 Kansas L. Rev. 723, 754 (May 2012). The retailers represented by Amici, large and small, have a critical interest in preserving the potential threat of direct purchaser enforcement actions. Some of Amici's members have served as plaintiffs in some of the most recent and prominent direct purchaser antitrust cases. *See supra* n.2.

Moreover, the signature feature of the deterrent and remedial regime of the antitrust laws – the treble damage remedy – is designed especially for private enforcers to utilize. The federal government brings civil claims in a law enforcement capacity, for injunctive relief, and states are prohibited from using their *parens patriae* powers on behalf of businesses such as Amici's members. *See* 15 U.S.C. § 15c(a)(1) (limiting *parens* standing in federal antitrust case to actions brought on behalf of natural persons). It has been long recognized that "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

In addition, in situations involving ongoing market-wide harm, as in much of the recent payment systems antitrust litigations in which merchants serve as direct purchaser plaintiffs, meaningful relief requires an injunction on behalf of large groups of merchants. The arbitration clause contained in the American Express Card Acceptance Agreement, however, explicitly precludes a merchant from seeking in arbitration any relief on behalf of any other merchant. Pet. App. 67a. Effectively this means no merchant subject to this agreement can effect systemic change. If there is a reversal of the Second Circuit's ruling, other businesses will blanket the market with American Express-style arbitration provisions and private litigation will provide no mechanism to stop market-wide anticompetitive business practices.

Companies with the greatest market power will have every incentive to further protect that power through the insertion of bilateral arbitration provisions into their standard-form agreements. Such incentives defeat the goals of both the Sherman Act and the FAA.

II. THE EFFECTIVE-VINDICATION RULE WILL HAVE LITTLE APPLICATION OUTSIDE OF ANTITRUST.

The Second Circuit's ruling narrowly applies to the factual question at hand, whether the Petitioners' arbitration agreement "is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory [antitrust] rights." *Amex III*, 667 F.3d at 212. This ruling should not be read as having the preclusive effect of invalidating other arbitration agreements.

The Second Circuit specifically placed limitations on its holding, making its applicability very narrow.

> We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather, as demonstrated by the different outcomes in our sister Circuits, we hold that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA "is a congressional declaration

> of a liberal federal policy favoring arbitration agreements."

Id. (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983)). The uncontested record below demonstrated that because of the exorbitant costs associated with proving their case, which far outweighed the amount of recovery under individual arbitration, Respondents were effectively barred from vindicating their federal statutory rights under the Sherman Act, and precluded from bringing an antitrust action against American Express. *Id.* The Second Circuit's application of the effective-vindication rule was correct and one that Amici fully supports.

A. The Effective-Vindication Rule Is Narrowly Tailored And Easily Administered.

Petitioners and their supporting amici incorrectly claim that the Second Circuit's ruling will have sweeping effects of invalidating arbitration agreements. *See, e.g.*, Pet. Br. 34. It is hard to imagine this to be the case since the Second Circuit's decision is exceedingly narrow, and there is such a high evidentiary burden placed on parties attempting to invoke the effective-vindication rule that it is seldom satisfied. The effective-vindication rule is rarely upheld as it applies only in cases in which parties are able to demonstrate that imposing prohibitive costs "preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Randolph*, 531 U.S. at 90. *See also Kristian v. Comcast Corp.*, 446 F.3d 25, 58-61 (1st Cir. 2006) ("Plaintiffs

will be unable to vindicate their statutory rights" where "to prosecute their antitrust claims successfully, Plaintiffs will have to undertake an elaborate factual inquiry . . . [costing] in excess of $600,000."). The evidentiary burdens are sufficiently heavy that in cases where parties failed to meet such burdens, courts have not balked at compelling arbitration. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) ("Plaintiff's federal claim fails under *Green Tree*"); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (Plaintiffs "developed no evidentiary record . . . establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration."); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 82 (D.C. Cir. 2005) (Roberts, J.) ("Under the approach set forth in . . . *Green Tree*, and *Vimar*, such speculation about what *might* happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable.").

There is, moreover, no reason to assume that the application of the *Randolph* prohibitive costs test will cause courts any undue burden. The question is simply whether the amount the plaintiff is seeking, viewed as of the time the showing is made, will be exceeded by the non-recoupable costs that the claimant will necessarily incur in prosecuting the individual claim (recognizing that those costs can be diminished by provisions in the arbitration agreement itself, that allow for some measure of cost-shifting or some measure of aggregation). There is no

basis for believing that this inquiry has caused courts any trouble in the years since *Randolph*, or that it will in the future.

B. The Effective-Vindication Rule Will Have Little Application Outside Of Antitrust.

Antitrust cases are known to be among the more daunting forms of cases brought due to the complexity of market definition issues and expense of economic analysis and discovery, for example. "Ever since the Supreme Court first articulated the rule of reason in 1918, antitrust cases have been famously complex and expensive." F. Matthew Ralph and Caroline B. Sweeny, *E-Discovery and Antitrust Litigation*, 26 Antitrust ABA 58 (2011); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007) (citing authorities on the "unusually high costs of discovery in antitrust cases"). Because current practice and doctrine require expansive and expensive analysis, Amici submit that it is unlikely that the effective-vindication rule will have much application outside of antitrust.

In most federal statutory cases, outside the antitrust context, an individual's ability to vindicate his or her individual rights will not typically require expensive expert testimony and expensive economic analysis. For example, in a standard wage-and-hour case under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, or a discriminatory treatment claim under the Age Discrimination in Employment Act, 29

U.S.C. § 621, *et seq.*, claimants will only be able to discharge their heavy burden of proving that they are unable to vindicate their rights in the arbitral forum by incurring substantial non-recoupable expenses, such as the expenses associated with expert analysis and electronic discovery.[3] Indeed, few claimants in these cases will be able to establish that expert testimony is required at all. And unless a court finds that the availability to vindicate rights is precluded by the arbitration provisions, arbitration will continue to be enforced in these contexts.

III. REVERSAL OF THE SECOND CIRCUIT'S RULING WILL RESULT IN UNFORESEEN NEGATIVE CONSEQUENCES TO THE VIABILITY OF ARBITRATION AS A MEANS OF DISPUTE RESOLUTION.

Businesses employ arbitration in order to have an informal, yet viable forum in which to resolve disputes. Oftentimes arbitration is preferred over the possibility of protracted and expensive litigation.

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[3] *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("it is unlikely that [ADEA] claims require more extensive discovery than RICO and antitrust claims, and since there has been no showing that the NYSE discovery provisions will provide insufficient to allow him a fair opportunity to prove his claim."). *See also*, David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 Kansas L. Rev. 723, 755 (May 2012) ("In other contexts [outside of antitrust], however, it is not clear that the . . . vindication of rights doctrine prevents negative externalities.").

Even in settings in which one party to the arbitration may have more clout over the other, arbitration can be preferred as an expedited and informal means to settle grievances, so long as the ability to vindicate rights is available. If litigants are denied the availability to effectively vindicate rights through arbitration by strict enforcement of exculpatory contractual terms, this could lead to unforeseen negative consequences to the arbitration system.

A. The Effective-Vindication Rule Is Essential To Maintaining The Legitimacy Of Arbitration.

If arbitration provisions are enforced regardless of whether parties can actually vindicate their rights via arbitration, the entire arbitral process is undermined. Both sides to an arbitration agreement have incentives to arbitrate when arbitration represents a quicker and less costly process and where the potential for resolving disputes fairly is available. Absent the ability to effectively vindicate rights, the purpose and legitimacy of arbitration is defeated.

Moreover, businesses, such as those represented by Amici, will be less likely to enter into arbitration agreements. The reason is either because they no longer see arbitration as a viable forum for dispute resolution or because the transaction costs associated with determining at the time of contracting whether any particular arbitration agreement is likely to lead to that business losing its rights if a dispute later

arises will be so great that they will simply choose to forgo arbitration altogether. Likewise, the employees, customers and business partners of Amici's members will no longer be willing to enter into arbitration agreements if they do not believe that their rights can be effectively vindicated in an arbitral forum. Thus, businesses will be forced to forego arbitration in any context and lose the substantial benefits associated with arbitration.

B. The Cost Pooling And Coordinated Arbitration Efforts Petitioners And Their Supporting Amici Propose Are Unworkable And Not Beneficial To Businesses That Truly Value Bilateral Arbitration.

Petitioners and their amici suggest that Respondents can pool their costs in preparing for arbitration, and maintain individual arbitrations – rendering collective action unnecessary. This proposal is flawed for several reasons.

First, Petitioners have made no showing that either cost pooling or coordinated arbitrations are possible or that either would decrease Respondents' costs to a level under the amount recoverable at arbitration. There is absolutely nothing in the record below regarding the procedures that Petitioners and their supporting amici now tout. Petitioners' rank speculation here is a far cry from the uncontested factual showing that Respondents made in the district court regarding prohibitive expert costs and

nowhere near what is necessary to rebut that showing.

Second, arbitration proceedings need to remain confidential. During arbitration, Amici's members are often called upon to produce confidential information, including employment records and customer data that give rise to an independent obligation to maintain confidentiality. The businesses represented by Amici cannot and do not want to waive confidentiality over such information. Yet such a waiver is a necessary predicate to litigants sharing work product across multiple arbitrations in the manner that Petitioners and their supporting amici appear to advocate.

This issue is highlighted by the facts of the underlying tying litigation. Here, the necessary market study requires extensive analysis of confidential data and documents regarding thousands of American Express accepting merchants and cannot be conducted based solely upon publicly available information. Prospective litigants therefore could not effectively pool expert costs absent a broad waiver of confidentiality. And prospective litigants are not inclined to comply with any such waiver.

Third, centrally orchestrated, serial arbitrations would pervert the purpose of entering into bilateral arbitration agreements. "The idea of serial arbitrations is unseemly, and leaves a bad taste in everyone's mouth." Steven J. Thompson, *Olympic Team Arbitrations*, 35 Val. U.L. Rev. 407, 429 (2001). Businesses,

such as those represented by Amici, bargain for individual arbitrations that work, arbitrations that allow employees and customers to vindicate their rights, and that allow the business to obtain the viable, functioning and informal forum it seeks. Because of the structure of the arbitration provision in the American Express Card Acceptance Agreement, potential litigants are forced to ban together as a class to vindicate rights, rather than individually arbitrate.[4] If arbitration agreements force litigants to assemble large groups in order to vindicate their rights, businesses potentially face more litigation due to barratry-like activities. Moreover, the arbitration process will be transformed beyond recognition. And to make matters worse, there is no compulsory res judicata or collateral effect from one arbitration to the next. The prescription of thousands of individual arbitrations is a prescription for chaos, as each case proceeds *de novo* over and over again – like Groundhog Day.

Amici recognize that there are many ways to structure arbitration agreements that allow parties to vindicate their rights, thereby preserving the

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[4] The Second Circuit concluded "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action" relying on respondent's expert finding that "out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million" while the highest possible cost for an individual merchant's recovery would be $38,549. *Amex III*, 667 F.3d at 218.

function of the arbitration system. For example, arbitration agreements can be structured to simply provide that the company pay all costs reasonably incurred by a prevailing plaintiff, or they may permit whatever aggregation is minimally necessary to allow the total damages sought to exceed the required non-recoupable costs. "[A] well-drafted arbitration agreement that gives companies incentive to settle meritorious claims is not exculpatory. Just as AT&T's agreement awarded attorney's fees to prevailing plaintiffs, future antitrust agreements could award expert fees to prevailing plaintiffs or to those who win more than the last settlement offer." Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (Summer 2012) (internal citations omitted). The preservation of arbitrability is vitally important, as well as the interest in preserving the potent threat of direct-purchaser antitrust actions. Affirming the Second Circuit promotes both of these laudable objectives and incentivizes the implementation and use of arbitration agreements that promote the vindication of rights through the arbitral forum.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

ITALIAN COLORS RESTAURANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND NATIONAL GROCERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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The National Community Pharmacists Association, National Association of Convenience Stores, and National Grocers Association respectfully submit this brief, as *amici curiae* and on behalf of themselves and their members, in support of respondents.[1]

INTERESTS OF *AMICI CURIAE*

Amici curiae represent thousands of small businesses that have been and will be forced, via contracts-of-adhesion, to effectively waive their rights to challenge anticompetitive conduct engaged in by dominant suppliers. Most of *amici*'s small business members have no choice but to enter into arrangements with payment networks, health insurance companies and other suppliers of goods and services that wield substantial market power in order to continue their operations. In many of these current and prospective arrangements, these suppliers are insisting that our small business members waive their ability to privately enforce antitrust law via a class action — a procedure that has necessarily been and must often be utilized by our small business members to remediate losses caused by suppliers' anticompetitive conduct and to enjoin such illegal conduct from continuing. If these class action waivers that have been forced upon our members are held to always be enforceable, even where our members would be deprived of effectively vindicating

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1. No counsel for any party authored this brief in whole or in part. No party or counsel for any party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici* and their members made any such monetary contribution. Counsel to the parties have provided blanket consent to this and all other *amici curiae* submissions.

their rights under antitrust law, our members will suffer substantial harm. They will likely be forced to suffer price increases, output reductions and inferior product quality.

The National Community Pharmacists Association (NCPA), founded in 1898, represents the interests of America's community pharmacists, including the owners, managers, and employees of more than 60,000 retail pharmacies, and 23,000 smaller, independent community pharmacies across the United States. Together, independent pharmacies represent an $88.5 billion health care marketplace, dispense nearly 40 percent of all retail prescriptions, and employ more than 315,000 people, including 62,400 pharmacists.

The National Association of Convenience Stores (NACS), founded in 1961, is the international association for convenience and fuel retailing. The U.S. convenience store industry, with more than 149,000 stores across the country, posted $681 billion in total sales in 2011, of which $486 billion were motor fuels sales. NACS has 2,200 retail and 1,600 supplier member companies that do business in the United States and nearly 50 other countries. The majority of these members are small, independent operators. More than 70 percent operate ten stores or less; more than 60 percent operate five stores or less; and nearly 40 percent of NACS' membership — and 62.7 percent of the convenience retailing industry as a whole — operate only a single store.

The National Grocers Association (NGA), founded in 1982, represents the interests of the retail and wholesale grocers that comprise the independent sector of the food distribution industry in the United States. Independents

are the true entrepreneurs of the grocery industry and are highly dedicated to their customers, associates, and communities. NGA's approximately 1,300 members include retail and wholesale grocers, state grocers associations, and manufacturers and service suppliers.

Consistent with the Congressional intent that motivated the adoption of Clayton Act Sections 4 and 16, *amici* and their member businesses have historically vindicated their rights and the public interest under the antitrust laws through private litigation. However, the high cost of antitrust litigation, particularly fees for necessary economic expert services, often has prevented *amici* and their members from remediating anticompetitive actions without spreading the costs of antitrust prosecution amongst multiple businesses via a class action.

Many of our member businesses, particularly the thousands of small business owners that *amici* collectively represent, have recently been forced by powerful suppliers and other entities to accept class action waivers in adhesion contracts. These waivers prevent *amici* and our members from effectively vindicating their antitrust rights, as it renders the cost of doing so prohibitive. These waivers further prevent other businesses and the public from enjoying the benefits of our members' private enforcement efforts, such as lower prices and increased output.

The Second Circuit's decision prevents this injustice by following settled law that requires class action waivers to be reviewed, case by case, and stricken if they preclude effective private antitrust enforcement. As our small business members will be effectively deprived of the substantial ability to constrain anticompetitive conduct

by dominant suppliers if the Second Circuit's decision is reversed, *amici* — on behalf of our members and ourselves — have a strong interest in seeing that decision affirmed.

SUMMARY OF ARGUMENT

This case is not about "class action lawyers" that "drive" class actions. Pet'rs' Br. at 54. Rather, it is about our members — business entities that participate in several different industries. It is these businesses who will have their antitrust rights compromised if class action waivers that are forced upon them by dominant suppliers and effectively eviscerate their private rights of action are nonetheless deemed enforceable.

The businesses we represent have often taken up the mantle of private antitrust enforcer to correct conspiratorial or monopolistic behavior that harms our economy. Consistent with the Congressional intent behind Sections 4 and 16 of the Clayton Act, they have challenged conduct in, for example, the payments and health insurance industries, that has resulted in supra-competitive prices or sub-competitive product output or quality. These actions have benefitted the U.S. economy and all of its constituents.

To enforce U.S. antitrust proscriptions and, in particular, to remedy actions that have caused artificial price increases or output restrictions, these businesses have launched class proceedings. They have done so in light of the large costs and associated risks inherent in vindicating their statutory antitrust rights, which render individual proceedings infeasible. Without the class procedures set forth in Fed. R. Civ. P. 23 that

enable plaintiffs to efficiently share these costs with class members, these businesses would have foregone, on multiple occasions, enforcement actions that have resulted in substantial public interest benefits.

Our member businesses deal with dominant, "must have" suppliers in a host of industries, including health care, financial services and others. To immunize themselves from antitrust prosecution, these suppliers have already forced class action waivers upon our members via contracts-of-adhesion. They have been able to require our much smaller members to enter these contracts by exerting the overwhelming bargaining leverage that they enjoy by being the providers of goods and services that are necessary to our members' continued operations.

Should the Court reverse the Second Circuit's well-reasoned opinion and hold that class action waivers are *always* valid, we expect even more dominant suppliers to insist upon class action waiver clauses as a prerequisite to contract. This is especially troubling, as the Second Circuit's decision readily follows this Court's precedents that prevent arbitration clauses from depriving businesses, like our members, from effectively enforcing their antitrust rights.

To the extent these waiver clauses will preclude our members from being able to finance antitrust enforcement actions, reversing the Second Circuit will erode their ability to fulfill the Congressional desire to supplement public antitrust enforcement, which relies on limited governmental resources, with actions brought by aggrieved private businesses. Should this occur, the deterrent and remedial impact of this critical statutory

regime will be severely gutted, likely leading to greater amounts of anticompetitive behavior that will distort the U.S. economy.

The Court should not let this happen.

ARGUMENT

I. CONGRESS HAS ENCOURAGED PRIVATE ANTITRUST ENFORCEMENT BY BUSINESSES, SUCH AS OUR MEMBERS, TO PROTECT THE PUBLIC INTEREST FROM ANTICOMPETITIVE BEHAVIOR.

Contrary to petitioners' claim, the Second Circuit did not impose its "own policy views" in this case. Pet'rs' Br. at 46. Rather, well-settled precedent recounts the strong Congressional interest in ensuring effective, private antitrust enforcement. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494-95 (2008) (antitrust regulatory scheme is designed "to induce private litigation to supplement official enforcement that might fall short if unaided"); *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) ("Private enforcement [is] an integral part of the congressional plan for protecting competition."); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (noting the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (Section 4 of the Clayton Act is a "prime example" of Congress "rely[ing] heavily on private enforcement to implement public policy . . . [and] encourag[ing] private litigation").

Congress sought to deputize actors as private Attorneys General to vindicate the public interest by correcting economic distortions resulting from anticompetitive behavior. *See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (noting "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action"); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("the purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws"). Indeed, for this reason, Congress structured the Clayton Act differently from other federal statutes, providing certain incentives to businesses to encourage them to bring private antitrust litigation when confronting anticompetitive behavior. For example, unlike employment discrimination statutes, Section 4 of the Clayton Act provides for treble damages to encourage private antitrust prosecution. *See, e.g., Exxon*, 554 U.S. at 494-95; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Moreover, while Section 4 does not recompense a prevailing plaintiff for a substantial amount of the costs that it necessarily incurs in prosecuting an antitrust case, including the vast amount of its economic expert costs (*see infra* Part II.B), Section 4 does, unlike other federal statutory regimes, mandate that prevailing plaintiffs be awarded certain costs. *See, e.g., Alyeska*, 421 U.S. at 263.

A primary reason that Congress offered these incentives to private parties is that governmental prosecutorial resources are limited, making it difficult for public prosecutors to detect and correct all anticompetitive conduct. *See Exxon*, 554 U.S. at 494-95 ("official enforcement [of the antitrust laws] might fall short if

unaided"); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (Clayton Act was designed to bring to "bear the pressure of 'private attorneys general' on a serious [] problem for which public prosecutorial resources are deemed inadequate."). Supplementing those resources is particularly important in times, like now, of budget crises, when public enforcement resources are particularly constrained.[2]

Petitioners do not even acknowledge this Congressional intent, which can often only be effectuated by businesses

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2. Petitioners also erroneously argue that "instead of promoting consumer class actions, the Congress relied on the ability of competitors and the federal government to enforce federal law." Pet'rs' Br. at 7. For this claim, petitioners cite an article by Herbert Hovenkamp and *Reiter v. Sonotone*. But neither Professor Hovenkamp nor *Reiter* indicate any Congressional preference for enforcement by competitors or government over consumers. *See* Herbert Hovenkamp, Antitrust's Protected Classes, 88 Mich. L. Rev. 1, 27 (1989) ("the debate surrounding passage of the Clayton Act . . . contains virtually no discussion of the respective merits of consumer or competitor lawsuits"); *Reiter*, 442 U.S. at 343 ("Congress designed the Sherman Act as a consumer welfare prescription . . . . At no time . . . was the *right* of a consumer to bring an action for damages questioned.") (emphasis in original, quotation omitted). Both of those sources do, however, note the infeasibility of individual consumer actions for small recoveries. *See* Hovenkamp, 88 Mich. L. Rev. at 23 ("Nearly every member of Congress who spoke on the issue suggested that [individual] consumer [antitrust] lawsuits would be ineffectual because consumer injuries were too small"); *Reiter*, 442 U.S. at 343 (during the Sherman Act debates, "some legislators questioned whether individual consumers would be willing to bring actions for relatively small amounts"). Thus, they reinforce the need for class proceedings as a means for plaintiffs with small damages amounts – whether merchants or consumers – to effectively vindicate their antitrust rights.

that, as consumers of other providers' services, have suffered losses as a result of anticompetitive conduct. Rather, petitioners argue that "[t]he Sherman Act [] reflects a judgment that the inability of some consumers to bring small-damages claims would not undermine the effective vindication of the Sherman Act's policies, in light of other enforcement mechanisms such as competitor suits and government enforcement." Pet'rs' Br. at 24. This is meritless. First, as stated, Congress purposely designed the Clayton Act to ensure that private suits are brought to supplement public enforcement, which is constrained by limited resources. Second, competitors often cannot challenge anticompetitive conduct that results in higher prices. They do not have standing to challenge horizontal agreements to fix price, for instance, because they can compete against the conspirators by offering lower prices. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (while supracompetitive pricing may "indeed violate the Sherman Act, . . . it could not injure competitors"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977).

II. CLASS ACTION WAIVERS, IF GIVEN BLANKET IMMUNITY FROM CHALLENGE, WILL ERADICATE NECESSARY AND BENEFICIAL ANTITRUST ENFORCEMENT BY BUSINESS ENTITIES.

A. Meritorious Antitrust Class Litigation Brought On Behalf of Businesses Has Benefitted Our Member Businesses And The Public.

Business entities have successfully brought antitrust class actions that have remedied anticompetitive conduct

and led to public benefits.[3] *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (noting "significant and lasting benefits for America's merchants and consumers" from settlement of merchant class action against Visa and MasterCard) (quotation omitted); *see also Am. Med. Ass'n v. United Healthcare Corp.*, 2009 WL 1437819, at *2 (S.D.N.Y. May 19, 2009) (settlement of antitrust class action brought by physician practices ended use of database that under-reimbursed practices and subscribers, enabled subscribers to easily determine charges for services, and established $350 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *3 (N.D. Cal. Dec. 27, 2011) (settlement of antitrust class action brought by businesses that purchased LCD panels "achieved . . . excellent result" of $388 million settlement fund).

For example, market-wide fixing of supply prices and other anticompetitive conduct can have a significant detrimental impact on prices charged by U.S. businesses. Class actions brought by businesses challenging such conduct often results in ensuring competitive prices ultimately charged to consumers. In light of this substantial public benefit, petitioners' claim that "the lower costs of bilateral arbitration" render it superior to class litigation is hollow. Pet'rs' Br. at 51.[4]

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3. Businesses have standing to pursue antitrust actions under Section 4 of the Clayton Act (for damages) and Section 16 of the Clayton Act (for injunctive relief). 15 U.S.C. §§ 12(a), 15(a), 26.

4. To the extent the Court believes that we, as trade associations, can bring class claims against suppliers that bar our members from bringing class suits, we cannot. Under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S.

B. Our Members Often Can Only Effectively Vindicate Their Statutory Antitrust Rights By Class Proceedings.

The costs of antitrust litigation often make it difficult for our members to engage in private enforcement outside of a class action, particularly because of the high cost of experts. As the leading antitrust authority has noted, expert evidence "is both ubiquitous and essential in antitrust cases[.]" *See* 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 309 (3d ed. 2007). The need for such expert evidence in antitrust cases has become even greater over the past few decades, as this Court has increasingly limited Section 1 *per se* analysis in favor of the Rule of Reason. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (applying Rule of Reason to minimum resale price maintenance claims); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (applying Rule of Reason to maximum resale price maintenance claims); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (applying Rule of Reason to horizontal price-fixing challenge); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (applying Rule of Reason to vertical restriction claims).

Rule of Reason treatment generally requires a plaintiff to demonstrate harm to competition by the practice in question, as petitioners note. Pet'rs' Br. at 53 (in "antitrust law, [] it may be hard to distinguish conduct

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333, 343 (1977), an association only "has standing to bring suit on behalf of its members when [] its members would otherwise have standing to sue in their own right[.]" If such waivers always bar our members from pursuing class suits, we would also be barred from pursuing such class litigation.

that harms competition and consumers from conduct that is aggressively competitive"). To prove harm to competition, the plaintiff must prove that the challenged conduct caused higher prices, reduced output, or harmed innovation on a market wide basis. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) ("rais[ing] prices and reduc[ing] output" are the "hallmarks of anticompetitive behavior" that violates Section 1). To prove a violation of Sherman Act Section 2, harm to competition also must be proven. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (monopolistic conduct "is of no moment to the antitrust laws if competition is not injured"). Economic expert analysis is necessary to prove such harm. *See Nilavar v. Mercy Health Sys.-W. Ohio*, 244 Fed. Appx. 690, 695 (6th Cir. 2007) ("anticompetitive effects . . . [are] usually shown through the use of expert testimony"); The Sedona Conference Commentary on the Role of Economics in Antitrust Law, 7 Sedona Conf. J. 69, 78 (2006) ("The plaintiff challenging [anticompetitive] behavior must demonstrate (through economic evidence) that it adversely affects competition . . . .").

Economic expert analysis in antitrust cases is generally very costly. *See, e.g.*, Maurice E. Stucke, Does the Rule of Reason Violate the Rule of Law?, 42 U.C. Davis L. Rev. 1375, 1467 (2009) (noting "antitrust litigation's significant costs for economic experts"). Indeed, petitioners do not dispute respondents' evidence that antitrust experts can cost hundreds of thousands to millions of dollars. *See In re Am. Express Merchants' Litig.*, 667 F.3d 209, 218 (2d Cir. 2012) (*Amex III*) (citing respondents' evidence of "substantial expert witness costs"). Nor do they dispute that the formal and informal discovery needed to support

necessary economic analysis in an antitrust case carries massive costs.

Most of these expert costs are non-recoverable, notwithstanding the fact that Sections 4 and 16 of the Clayton Act allow some cost shifting. Prevailing antitrust plaintiffs are entitled to reimbursement of expert costs only at the statutory rate of *$40 per day*. *See* 28 U.S.C. § 1821(b); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) ("when a prevailing party [in an antitrust case] seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of 28 U.S.C. § 1821(b)" of $40 per day) (alteration omitted). Forty dollars a day does not even begin to approach the cost of an antitrust expert. To illustrate, even respondents' low estimate of $300,000, at the statutory rate, reflects 7,500 days of expert work — every day for more than 20 years.

C. The Blanket Protection for Class Action Waivers That Petitioners Seek Will Immunize Entities From Antitrust Prosecution.

If, as petitioners request, class action waivers are enforced under *all* circumstances, suppliers and other entities with which our members deal will be effectively immunized from antitrust prosecution. This is because, as this Court has recognized, where plaintiffs have small individual damages claims, "[e]conomic reality dictates that [their] suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

For example, following is a standard arbitration clause that is being widely forced upon a number of our

small business members that provide health-care related services by a substantial pharmaceutical benefits manager. It contains a class action waiver that explicitly notes its application to antitrust claims, while also requiring each side to pay their own costs — confirming that suppliers and others that insist on such waivers will, if the waivers are enforced under all circumstances, use them as a shield against antitrust scrutiny. It provides (emphases added):

> . . . The parties agree that any dispute arising from or relating to this Agreement or their business relationship which cannot be settled by mutual agreement shall be submitted to final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") . . . . The parties agree that this Arbitration Agreement is subject to, and shall be interpreted in accordance with, the Federal Arbitration Act, 9 U.S.C. §§ 1-14. No claim or allegation shall be excepted from this Arbitration Agreement, including alleged breach of the Agreement, alleged violations of state or federal statutes or regulations, tort or other common law claims, and claims of any kind that a party to the Agreement has conspired or coordinated with, or aided and abetted, one or more third parties in violation of law. Without limiting the foregoing, **this Arbitration Agreement requires arbitration of disputes involving antitrust, racketeering and similar claims. . . .**
>
> **. . . Each party shall be responsible for its own attorneys' fees and such other costs and**

> **expenses incurred related to the proceedings**, except to the extent the applicable substantive law specifically provides otherwise.
>
> . . . Any arbitration under this Arbitration Agreement shall be solely between [member] and Provider, shall not be joined with another lawsuit, claim, dispute or arbitration commenced by any other person, and may not be maintained on behalf of any purported class. **Both parties waive the right to participate in any class action against the other**, and the arbitrator has no authority to adjudicate any class claims or class arbitration.

Blanket protection for class action waivers, such as the one referenced above, is particularly disconcerting for businesses that, like our members, are beholden to dominant suppliers that have insisted or will insist on such waivers. *See, e.g., United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (holding that Visa and MasterCard have economic power over merchants); Am. Med. Ass'n, Competition in health insurance: A comprehensive study of U.S. Markets 5 (2009) (noting market power of health insurers, with whom pharmacists are required to negotiate).[5]

Petitioners argue that dispute resolution costs, including expert costs, are also incurred in bilateral

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5. Contrary to petitioners' suggestion, it is generally not our members' choice to accept class action waiver clauses. Pet'rs' Br. at 20. Many times, these clauses are forced upon our members by essential suppliers who have disproportionate bargaining power.

arbitration processes. Pet'rs' Br. at 40-45. However, as petitioners acknowledge, one "feature of the aggregation brought about by class actions [is] its capacity to facilitate the pursuit of small claims by spreading the costs of litigation across the class." *Id.* at 53. This "fee-spreading incentive" is a "central concept of Rule 23" and a "significant benefit to [class] claimants," particularly those with small individual recoveries (that could lead to a large recovery for the class). *See Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 n.9 (1980). *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("A class action . . . aggregat[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quotation omitted).

Equally unavailing is the Chamber of Commerce's argument that "pursuing serial individual arbitrations (or small claims actions) can be an economically viable business model." COC Br. at 28-30. Courts have recognized that class proceedings are a particularly effective means of remediating small businesses' claims. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001) (noting "the powerful policy considerations that favor certification" of merchant class suing credit card networks under the antitrust laws, including that "[w]ithout certification, ... millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct") (quotation omitted); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1270-71 (11th Cir. 2004) ("consideration" that "class actions often . . . make it economical to bring suit" supported certifying class of doctors asserting RICO claims against insurers, "especially . . . when the defendants are corporate

behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings") (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985)).

The sources cited by the Chamber are not apposite. None of them involve antitrust claims, thus they do not implicate the Congressional policy favoring private enforcement or the expert costs at issue here. *See supra* Parts I (Congressional policy), II.B (necessity of experts in antitrust cases).[6] And the cases addressed in the news articles did not involve class action waivers at all — rather, they were brought by individuals who chose to opt out of *class settlements*.

Finally, the American Bankers Association's argument that "published studies show . . . high levels of satisfaction for parties who participate in arbitration" also fails. ABA Br. at 10. None of the "studies" the ABA cites address complex antitrust claims that will costs millions of dollars to litigate, nor do they offer any indication of the complexity of the claims they do address — thus how expensive they might be. *Id.* at 10-13 (citing studies). Rather, the studies either address claims that generally are far less complex than antitrust claims to litigate (e.g., employment, lending, personal injury), or they do not

6. *Hendricks v. AT&T Mobility LLC* involved a class action waiver that — unlike the waiver here — provided individual claimants with recovery of their expert costs if they were awarded more than AT&T's last settlement offer. 823 F. Supp. 2d 1015, 1022 (N.D. Cal. 2011) (for this reason, the court found that "[t]he costs of pursuing Plaintiff's case are therefore not a basis for invalidating the agreements").

identify the nature of the claims at all. Casting further doubt on the studies' reliability is that fact that one of them was financed by the American Bankers Association and at least two others were financed by organizations that advocate for arbitration over litigation.

III. PETITIONERS' POSITION SHOULD BE REJECTED BECAUSE IT WOULD UPHOLD CLASS ACTION WAIVERS EVEN WHEN THEY EFFECTIVELY DEPRIVE ENTITIES OF THEIR RIGHTS TO PRIVATE ANTITRUST ENFORCEMENT.

A. The Case-By-Case Approach to Judging These Waivers Advocated by Respondents and the Second Circuit Is Correct.

Class action waivers should not be enforced if they would preclude "prospective litigant[s] [from] effectively . . . vindicat[ing their] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (Rehnquist, C.J.) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 637 (1985)). *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (same); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (quoting *Randolph*, 531 U.S. at 90). That is precisely the effect of the class action waiver at issue here: By prohibiting businesses from proceeding on a class basis, it strips them of the ability to seek redress from petitioners for anticompetitive conduct.

Determining at the outset whether a case would be so expensive to prosecute that a class action waiver

effectively nullifies the private right of action would not unduly burden courts. Indeed, courts regularly make threshold findings that involve at least as much, if not far more, evidentiary review as what would be required here. *See, e.g., Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000) (in considering motion to dismiss for lack of subject matter jurisdiction filed "promptly" after complaint, court reviewed evidentiary record "amassed over two years . . . of discovery solely on the jurisdictional issue").

In any event, any burden such a review might impose cannot trump the Congressional intent to encourage private antitrust enforcement. *See Reiter*, 442 U.S. at 344 (rejecting argument that class actions "will add a significant burden to the already crowded dockets of the federal courts" because "Congress created . . . § 4 precisely for the purpose of encouraging private challenges to antitrust violations . . . [thus it must] provide the judicial resources necessary to execute its mandates").

B. *Concepcion* Is Not Applicable.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), does not affect this result. First, it was not an antitrust case. *See id.* at 1744 (noting case involved alleged false advertising and fraud in cell phone service sales). Thus, it did not implicate the Congressional intent to encourage private enforcement or other policy objectives at issue here. Second, it turned on a preemption analysis, namely "whether [the FAA] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." *Id.* at 1746. *See also id.* at 1753 (reversing the Ninth Circuit because the California

rule "is preempted by the FAA"). This case, on the other hand, turns on the plaintiffs' ability to vindicate federal statutory rights, and whether that ability is precluded by petitioners' arbitration clause. *See* Resp'ts' Br. at i; Pet'rs' Br. at i.

Third, the arbitration clause in *Concepcion* was very different from the one at issue here. The *Concepcion* clause provided cost-shifting for non-frivolous claims; permitted arbitrators to award equitable relief; and guaranteed a substantial minimum recovery and twice claimants' attorneys' fees if their arbitration award exceeded AT&T's last settlement offer. 131 S. Ct. at 1744, 1753. The clause here provides none of these things. *See Amex III*, 667 F.3d at 209-10. Therefore, this Court can find none of the comfort in *Concepcion* that individual merchants are "*better off* under their arbitration agreement . . . than they would have been as participants in a class action[.]" 131 S. Ct. at 1753 (emphasis in original).

C. *Stolt-Nielsen* Is Not Applicable.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), also does not apply. Like *Concepcion*, *Stolt-Nielsen* had nothing to do with the enforceability of a class action waiver. Rather, it addressed "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with" the FAA. *Id.* at 1764. Moreover, significant to this Court was that the plaintiffs in that case (consumers of the shipping services at issue) *chose* to enter a contract that was silent on class arbitration. *See id.* at 1764 (customers "typically select the particular [contract] that governs the shipments"). Thus, as Justice Ginsburg noted in dissent,

Stolt-Nielsen's holding does not apply to "contracts of adhesion presented on a take-it-or-leave-it basis" such as the contract at issue here. *See id.* at 1783; *see also supra* Part II.C (class action waivers are often forced upon merchants by essential suppliers).

In addition, petitioners misrepresent the basis of this Court's decision in *Stolt-Nielsen*. Petitioners claim that this Court "expressly rejected the arbitral panel's justification that class proceedings were necessary given the plaintiff's 'negative value claims' . . . as an impermissible effort by the panel 'to impose its own view of sound policy regarding class arbitration.'" Pet'rs' Br. at 12 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1767-68, 1770 & n.7). However, the "policy view" this Court rejected was the panel's conclusion, based on a series of decisions, "that class arbitration is beneficial in a wide variety of settings" thus it should be allowed absent "good reason not to" allow it. *Stolt-Nielsen*, 130 S. Ct. at 1769 (quotation omitted). This Court only referenced "negative value claims" once, in a footnote recounting proceedings before the arbitration panel. *Id.* at 1769 n.7. It pointed out that the presence of "negative value claims" was a common factor between the decisions cited by the panel and the cases of many of the claimants before it. *Id.* However, the Court gave no indication that the presence of negative value claims played a role either in the arbitration panel's or this Court's conclusions.

CONCLUSION

For the reasons stated here and in respondents' brief, *amici* NCPA, NACS and NGA respectfully request that the Court affirm the Second Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *ET AL.*,
Petitioners,

v.

ITALIAN COLORS RESTAURANT,
ON BEHALF OF ITSELF AND ALL SIMILARLY
SITUATED PERSONS, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") permits a court to invalidate an arbitration agreement that precludes the arbitration of federal statutory claims on a classwide basis.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF has long been committed to a reasonable interpretation of federal statutes affecting the rights of businesses in their contractual relationships with other businesses and with

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that, on November 19, 2012, and on December 12, 2012, counsel for Petitioners and counsel for Respondents respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

individuals. In this connection, NELF filed an amicus brief in *Concepcion*, in support of the enforcement of class action waivers in arbitration agreements. The Second Circuit's decision in this case is of direct importance to NELF's business constituents, many of whom make use of predispute arbitration agreements containing class action waivers. If those waivers can be invalidated, such businesses might face class action litigation based on federal statutory claims.

In NELF's view, the Second Circuit's decision contains significant errors of law that should be corrected. In essence, the lower court has misinterpreted, and thus has failed to harmonize, this Court's key precedents relevant to the issue of enforcing class action waivers in agreements to arbitrate federal statutory claims. Contrary to the lower court's opinion, this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); establish collectively that the FAA requires enforcement of class action waivers in agreements to arbitrate federal statutory claims, and that only Congress has the power to override the FAA's mandate on this issue. Consequently, a court has no discretion to invalidate a class action waiver in an otherwise valid arbitration agreement, notwithstanding a concern for the costs of proving a claim on an individual rather than an aggregated basis.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general

economic significance to both the New England and the national business communities.[2] NELF believes that this is such a case and that its brief would provide an additional perspective to aid this Court in deciding the issues presented.

SUMMARY OF ARGUMENT

The question presented in this case is two-fold: (1) Does the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), mandate the enforcement of class action waivers in the arbitration of federal statutory claims and, if so, (2) do courts nonetheless have the discretion to override the FAA's mandate when the costs of proving a federal claim on an individual rather than aggregated basis may be prohibitive? In NELF's view, the answer to the first question is yes, unless Congress has expressly provided otherwise, and the answer to the second question is no.

This Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), together establish that the FAA requires the enforcement of a class action waiver contained in a

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[2] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

valid predispute arbitration agreement, with respect to state *and* federal statutory claims, and that only Congress has the power to override the FAA's mandate. Congress has not exercised that power in the statute at issue here, the Sherman Act, 15 U.S.C. §§ 1-15. Thus, the disputed class action waiver in this case should be enforced.

While the FAA mandates enforcement of a class action waiver contained in a valid predispute arbitration agreement, the FAA's saving clause nevertheless allows for generally applicable contract challenges to arbitration agreements that contain class action waivers, such as challenges to the agreement's formation as a whole. Another such generally applicable challenge is discussed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). Those cases allow challenges to contract terms pertaining to the special costs and procedures of arbitration that do not exist in court and that may preclude the vindication of federal statutory rights in a particular arbitral forum.

Contrary to the Second Circuit's opinion in this case, however, the "vindication" principle discussed in *Mitsubishi* and *Green Tree* does not consider the *inherent* costs of proving a claim, whether on an individual or classwide basis. Those costs would apply as much in court as they would in arbitration. The vindication principle, by contrast, compares the costs and procedures in arbitration with those applicable in court to determine whether an arbitration agreement has imposed special costs or burdens, such as arbitrators' fees or the deprivation of a substantive federal remedy, that

may create an unreasonable alternative forum for the adjudication of federal claims.

Plaintiffs do not challenge the special costs of arbitration under the agreement. Nor do they argue that the agreement deprives them of a substantive federal remedy. Instead, they dispute only the consequences of enforcing the class action waiver with respect to the inherent costs of proving their claims. Their challenge therefore fails under *Green Tree* and *Mitsubishi*. But their challenge also fails under both *Concepcion* and *CompuCredit*. *Concepcion* held that judicial concern for the small-value claimant cannot override the FAA's mandate enforcing class action waivers. *CompuCredit* held that only Congress can override that mandate, such as by creating a substantive, unwaivable right to seek a class action. The combined effect of the decisions in *Green Tree*, *Mitsubishi*, *Concepcion*, and *CompuCredit* therefore establishes that enforcement of a class action waiver does not create cognizable arbitration "costs" for purposes of a vindication challenge. Consequently, the Second Circuit has misinterpreted *Green Tree* as creating an end-run around the FAA, *Concepcion*, and *CompuCredit*.

Concepcion does not, however, preclude *all* coordinated efforts to enforce the rights of parties with small-value claims. For example, nothing in *Concepcion* should prevent similarly situated parties who are subject to class action waivers from pooling their resources and organizing their efforts to arbitrate their related individual claims. Nor should *Concepcion* preclude *public* enforcement of the rights of individuals who are subject to class action waivers, such as through the States' attorneys general in their capacity as *parens patriae*, and with

the assistance, if necessary, of private law firms retained on a contingent-fee basis. Such alternative means of enforcing small-value claims should prevent them from slipping through the legal cracks.

ARGUMENT

I. ABSENT A CONTRARY CONGRESSIONAL COMMAND, THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF A CLASS ACTION WAIVER IN THE ARBITRATION OF FEDERAL STATUTORY CLAIMS.

In this case, the Second Circuit has restricted this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to its immediate facts, namely the arbitration of state law claims, and, even further, the invalidation of a categorical rule of decision hostile to class action waivers. *See In re Am. Express Merch. Litig.*, 667 F.3d 204, 213-214, 219 (2d Cir. 2012). According to the Second Circuit, *Concepcion* applies neither to the arbitration of federal statutory claims nor to a case-specific invalidation of a class action waiver based on a generally applicable defense. *Id.*

The Second Circuit has misinterpreted *Concepcion*. That case is broadly based on the core purpose of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), that arbitration agreements must be enforced according to their terms to ensure streamlined, individual proceedings. *See Concepcion*, 131 S. Ct. at 1748. That core purpose must be honored wherever the FAA applies,

regardless of the source of the underlying statutory claim or the basis of a challenge to the class waiver. In short, *Concepcion* and related cases establish that the FAA mandates the enforcement of class action waivers in valid arbitration agreements, unless either the arbitration agreement at issue or Congress has expressly provided otherwise.[3] *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (no classwide arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so.") (emphasis in original); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (only "a contrary congressional command" in another federal statute can override FAA's mandate).

Concepcion establishes that any judicial invalidation of a class action waiver invariably defeats the FAA's core purpose because it requires the availability of classwide arbitration as a condition of an arbitration agreement's enforcement. "Requiring the availability of classwide arbitration [in turn,] interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748. Compelled classwide arbitration, under any circumstances, transmogrifies the arbitration

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[3] There may be certain limited "procedural" challenges to a class action waiver, not raised here, that survive *Concepcion*. *See id.*, 131 S. Ct. at 1750 n.6 ("Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.").

process as conceived under the FAA and the parties' agreement, by manufacturing a legion of intractable procedural and legal complexities that defeat the informality of the arbitral process. *Id.* at 1751-53.

Contrary to the Second Circuit's opinion in this case (*In re Am. Express*, 667 F. 3d at 219), neither the FAA nor *Concepcion* would permit a class action in court as a permissible means to avoid nonconsensual classwide arbitration when a court invalidates a class action waiver. This is so because the FAA requires courts to enforce the parties' basic choice to resolve their disputes in arbitration and not in court. *See Concepcion*, 131 S. Ct. at 1745 (discussing FAA's "liberal federal policy favoring arbitration"). Under *Concepcion*, an arbitration agreement cannot be invalidated because of the class action waiver. The operative dichotomy under the FAA is therefore between individual and class arbitration, and *not* between individual arbitration and a judicial class action. As one court astutely observed, "[i]t would be anomalous indeed if the FAA--which promotes arbitration--were offended by imposing upon arbitration nonconsensual [class action] procedures that interfere with arbitration's fundamental attributes, but not offended by *the nonconsensual elimination of arbitration altogether*." *Cruz v. Cingular Wireless*, 648 F.3d 1205, 1213 (11th Cir. 2011) (emphasis added).

Also contrary to the Second Circuit's opinion (*In re Am. Express*, 667 F. 3d at 214), *Concepcion* establishes that the class action waiver falls outside the scope of the FAA's saving clause, contained in 9 U.S.C. § 2.[4] That provision allows parties to

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[4] Section 2 of the FAA provides, in relevant part:

challenge arbitration agreements under generally applicable contract defenses. *See Concepcion*, 131 S. Ct. at 1746 ("The final phrase of § 2 . . . permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability . . . .") (citation and internal quotation marks omitted).

Concepcion removes the class action waiver from the FAA's saving clause because any invalidation of the class waiver, even under a general contract defense requiring a case-specific determination, would "rely on the uniqueness of an agreement to arbitrate," i.e., its streamlined simplicity, as a basis for invalidating the arbitration agreement. *Concepcion*, 131 S. Ct. at 1747. As this Court has explained, the FAA's saving clause cannot be interpreted to defeat the FAA itself:

> Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve . . . rules that stand as an obstacle to the accomplishment of the

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> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

> FAA's objectives. . . . [A] federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, *the act cannot be held to destroy itself.*

Concepcion, 131 S. Ct. at 1748 (citations and internal quotation marks omitted) (emphasis added).

Indeed, only Congress, and not the courts, has the power to make the policy choice to override the FAA's mandate. As this Court recently explained, "[the FAA] requires courts to enforce agreements to arbitrate according to their terms[,] . . . even when the claims at issue are *federal statutory* claims, unless the FAA's mandate has been *overridden by a contrary congressional command.*" *CompuCredit v. Greenwood*, 132 S. Ct. at 669 (citations and internal quotation marks omitted) (emphasis added).

CompuCredit illustrates that only express statutory language precluding or limiting the arbitration of claims can override the FAA's mandate. *See CompuCredit*, 132 S. Ct. at 669, 673 (where statute provided "right to sue," and stated that any waiver of rights "shall be treated as void," statute "*is [nevertheless] silent* on whether claims under the [statute] can proceed in an arbitrable forum, [and therefore] the FAA requires the arbitration agreement to be enforced according to its terms.") (emphasis added). *See also id.* at 672 (discussing other federal statutes that do expressly bar or limit arbitration of claims).

The real question here, then, is whether the Sherman Act, 15 U.S.C. §§ 1-15, contains a "contrary

congressional command" to override the FAA's strong mandate enforcing class action waivers.[5] The Sherman Act makes no mention whatsoever of class actions or of arbitration agreements. Nor do the plaintiffs argue to the contrary. *See In re Am. Express*, 667 F.3d at 213 ("Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions . . . ."). And even if the Sherman Act did provide a right to seek collective action, that alone would not create an *unwaivable* statutory right to a class action necessary to satisfy *CompuCredit* and defeat *Concepcion*. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (federal statutory right to seek class action is waivable procedural right under FAA). *See also CompuCredit*, 132 S. Ct. at 670 ("If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed.") (citation omitted).

The only available class action mechanism in this case would therefore arise under Fed. R. Civ. P. 23, which readily fails *CompuCredit* because Congress has defined Rule 23's limited procedural purpose in its statute of origin, the Rules Enabling Act. That statute mandates that "[s]uch rule[] shall not abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. §2072(b). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.

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[5] It is well established that federal antitrust claims are arbitrable. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Ct. 1431, 1443 (2010) (plurality opinion) ("A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . *[I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged.*") (emphasis added). Therefore, the FAA's broad mandate enforcing class action waivers must apply to plaintiffs' federal antitrust claims.

As this Court acknowledged in *CompuCredit*, however, Congress has the last word on the meaning of the FAA and its application to other federal statutes. And indeed Congress has already taken steps after *Concepcion* to reevaluate the wisdom of enforcing arbitration agreements with respect to consumer claims, employment claims, and civil rights claims.[6] However, unless and until Congress

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[6] For example, immediately after *Concepcion* was decided, members of Congress reintroduced the proposed Arbitration Fairness Act, after the bill had remained in committee in 2007 and 2009. *See* Arbitration Fairness Act of 2011, S. 987, 112th Cong.; H.R. 1873, 112th Cong. (referred to S. Comm. on the Judiciary, May 12, 2011), *available at* http://www.govtrack.us/congress/bills/112/s987; http://www.govtrack.us/congress/bills/112/hr1873 (as visited Dec. 26, 2012). *See also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 652 (2012) (discussing same). This bill "[d]eclares that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, or civil rights dispute." S. 987, H.R. 1873. Moreover, members of Congress have introduced another bill that proposes to amend the FAA "to exclude from the definition of 'commerce' all contracts of employment" and "[d]eclare[] that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute." H.R. 4181, 112th Cong. (referred to S. Comm. on the Judiciary, Mar. 8, 2012), *available at* http://www.govtrack.us/congress/bills/112/hr4181 (as visited

provides otherwise, *Concepcion* instructs that class action waivers must be enforced in the arbitration of federal statutory claims.

This is not to say, however, that *Concepcion* immunizes arbitration agreements with class action waivers from generally applicable contract defenses. To the contrary, *Concepcion* honors the FAA's saving clause and therefore leaves undisturbed general contract defenses that pertain to aspects of an arbitration agreement other than the class action

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Dec. 26, 2012). As of the filing of this brief, these bills are still in committee.

On another front, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. §§ 5301-5641, creates the Consumer Financial Protection Bureau ("CFPB"), "an independent bureau within the Federal Reserve designed to protect consumers in their transactions with banks, credit card companies, mortgage brokers, and other financial institutions." Gilles & Friedman, *After Class*, 79 U. Chi. L. Rev. at 654 (discussing 12 U.S.C. §§ 5511-5603). In particular, the Dodd-Frank Act requires the CFPB to conduct a study on the use of predispute arbitration agreements in consumer financial transactions, and to submit a completed study to Congress. *See* 12 U.S.C. § 5518(a). The CFPB also has the delegated rule-making authority, consistent with the findings of its study, to "prohibit or impose conditions or limitations on the use of" such predispute arbitration agreements, "if the [CFPB] finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." 12 U.S.C. § 5518(b). The CFPB launched its study on April 24, 2012, and it is still in progress. *See* http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/; http://www.cfpbmonitor.com/tag/arbitration/ (as visited Dec. 26, 2012).

waiver. *See Concepcion*, 131 S. Ct. at 1746. That is, *Concepcion* recognizes that the FAA contemplates arbitration as a reasonable private forum for the adjudication of individual disputes.

For example, a party could still challenge, post-*Concepcion*, the formation of the arbitration agreement as a whole. *See id.*, 131 S. Ct. at 1755 (Thomas, J., concurring) (discussing formation defenses of fraud, duress, and mutual mistake) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967)). *See also Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (referring approvingly to state's general unconscionability defense while instructing state supreme court, on vacatur and remand, to reconsider decision invalidating agreement to arbitrate wrongful death claim "under state common law principles that are not specific to arbitration and pre-empted by the FAA").

Concepcion would also not disturb a party's ability to challenge the terms of an arbitration agreement pertaining to the special costs and procedures of arbitration that do not exist in court and that may impede the vindication of federal statutory rights in a particular arbitral forum. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 84, 90-91 (2000) (discussing challenge to contractual arbitration costs, such as filing fees and arbitrators' fees); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 & n.19 (1985) (discussing availability in arbitration of statutory treble-damages remedy under Sherman Act).[7]

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[7] Amicus discusses *Mitsubishi* and *Green Tree* more extensively in Part II, below, which addresses the "vindication of federal

Concepcion makes clear, however, that enforcement of a class action waiver is essential to serve the FAA's mandate of honoring party autonomy in the crafting of informal procedures for the private resolution of individual disputes. *See id.*, 131 S. Ct. at 1749. Contrary to the Second Circuit's opinion in this case, courts have no independent authority to refuse to enforce a class action waiver. This principle remains constant, regardless of the statutory claim that is subject to the class waiver, and regardless of the basis for challenging the class waiver--whether it is a rigid, *per-se* rule (such as the *Discover Bank* rule at issue in *Concepcion*) or a case-specific determination (such as the Second Circuit's purported approach in this case). The latter decision offends the FAA as much as the former, because "[t]he Plaintiffs' evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*--namely, that the class action waiver will be exculpatory, because most of these small-value claims will go . . . unprosecuted." *Cruz v. Cingular Wireless*, 648 F.3d at 1214.

II. ABSENT A CONTRARY CONGRESSIONAL COMMAND, ENFORCEMENT OF A CLASS ACTION WAIVER DOES NOT INTERFERE WITH THE VINDICATION OF FEDERAL STATUTORY RIGHTS.

Concepcion broadly establishes, then, that the FAA mandates enforcement of a class action waiver. This is so notwithstanding the resulting costs of

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statutory rights" principle and its harmonization with *Concepcion* and *CompuCredit*.

arbitrating a claim on an individual basis. *See id.*, 131 S. Ct. at 1753 (rejecting argument of the "small-dollar" claimant). That is, judicial concern for the prosecution of small-value claims, in which the individual's anticipated cost of proof exceeds his or her likely recovery, must yield to the FAA's mandate. And *CompuCredit* holds that only Congress, and not the judiciary, can make the policy choice to relax the FAA's mandate with respect to federal statutory claims.

And yet, despite this Court's clear precedent, the Second Circuit has nevertheless invalidated the class action waiver here based precisely on the argument of the small-value claimant rejected in *Concepcion*. The lower court concluded that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action," based on a record showing high anticipated expert costs and relatively low anticipated individual damages. *In re Am. Express*, 667 F. 3d at 218.[8]

The Second Circuit based its holding on its interpretation of this Court's decisions in *Mitsubishi* and *Green Tree*, discussed above. *See In re Am. Express*, 667 F.3d at 214 (arbitration agreement enforceable "'so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum.'") (quoting *Mitsubishi*, 473 U.S. at 632 (emphasis added by Second Circuit)). In particular, the lower court concluded that *Green Tree*

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[8] In particular, plaintiffs submitted an expert's affidavit estimating the cost of an expert economic study, ranging from several hundred thousand dollars to over $1 million. *In re Am. Express*, 667 F. 3d at 218. By contrast, the estimated individual damages range from $5,252 to $38,549. *Id.*

would allow a discretionary judicial exception to the FAA's mandate when a class action waiver applies to the arbitration of federal statutory claims, and the plaintiff shows that enforcement of the class waiver would result in "prohibitively expensive costs" of individual proof. *See In re Am. Express*, 667 F.3d at 210 ("[W]hen 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'") (quoting *Green Tree v. Randolph*, 531 U.S. at 92).

The Second Circuit has misinterpreted *Mitsubishi* and *Green Tree*. Contrary to the Second Circuit's view, those cases do not address the *inherent* costs of proving a claim, whether on an individual or classwide basis. Those costs are not created by an arbitration agreement and would apply as much in court as they would in arbitration. Instead, the "vindication" inquiry compares the arbitral forum with the judicial forum and asks whether an arbitration agreement imposes special costs or burdens, such as arbitrators' fees or the deprivation of a substantive federal remedy, that would not exist in court and that could therefore make arbitration a comparatively inaccessible or ineffective forum. *See Green Tree*, 531 U.S. at 84, 91 (discussing challenge to contractual arbitration costs, such as filing fees and arbitrators' fees); *Mitsubishi*, 473 U.S. at 636-37 & n.19 (discussing availability in arbitration of statutory treble-damages remedy under Sherman Act). *See also* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets The Class* Action, 86 Notre Dame L. Rev. 1069, 1124 (2011) ("The question under

Green Tree is whether the difference between litigation and arbitration at hand makes the latter forum cost 'prohibitive' . . . .").

Otherwise put, the disputed costs in *Green Tree* pertained solely to the contractual "price of admission" to arbitration, namely the payment of arbitration filing fees, arbitrators' fees, and other special arbitration expenses. *See Green Tree*, 531 U.S. at 84, 91 (dismissing as "too speculative" plaintiff's challenge to potentially prohibitive arbitration costs: "the arbitration agreement was [merely] silent with respect to payment of *filing fees, arbitrators' costs, and other arbitration expenses.*") (emphasis added). *See also In re Am. Express Merch Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs, C.J., dissenting from denial of rehearing *en banc*) (describing *Green Tree* costs as "price of admission" to arbitration).

Green Tree's discussion of "large" or "prohibitive" arbitration costs, 531 U.S. at 90-91, is a particular application of this Court's "vindication" language that appeared in *Mitsubishi*. *See id.*, 473 U.S. at 637. In *Mitsubishi*, the Court explained that an arbitration agreement under the FAA is a kind of forum selection clause, 473 U.S. at 630, which creates a presumptively reasonable alternative private forum for the vindication of federal statutory rights. *See id.* at 637 ("[S]o long as the prospective litigant effectively may vindicate its [federal] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

Mitsubishi focused on the contractual terms governing the arbitral proceedings and discussed the

availability of a substantive statutory remedy--treble-damages under the Sherman Act. *See id.*, 473 U.S. at 636-37 & n.19. *Green Tree* focused instead on the cost of gaining access to arbitration under the agreement, such as the payment of arbitrators' fees and an arbitration filing fee. *Id.*, 531 U.S. at 84, 90-91. The vindication inquiry has thus been applied to the contractual "price of admission" to arbitration and to the availability of substantive statutory remedies in arbitration.

Plaintiffs here dispute neither the "price of admission" to arbitration nor the deprivation of any substantive federal remedy under the agreement.[9] Instead, they dispute only the consequences of enforcing the class action waiver with respect to the inherent costs of proving their claims. Their challenge therefore fails under *Green Tree* and *Mitsubishi*. But their challenge also fails under both *Concepcion* and *CompuCredit*. *Concepcion* held that judicial concern for the small-value claimant cannot override the FAA's mandate enforcing class action waivers. *Id.*, 131 S. Ct. at 1753. And *CompuCredit* held that only Congress can override that mandate, such as by creating a substantive, unwaivable right to seek a class action. *See CompuCredit*, 132 S. Ct. at 669.

The combined effect of the decisions in *Green Tree*, *Mitsubishi*, *Concepcion*, and *CompuCredit* therefore establishes that enforcement of a class action waiver here does not create cognizable

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[9] As amicus has argued in Part I, above, there is no "contrary congressional command" creating a substantive, unwaivable right to seek a class action in this case. *See CompuCredit*, 132 S. Ct. at 669.

arbitration "costs" for purposes of a vindication challenge. The Second Circuit has consequently misapplied this Court's precedent by concluding that judicial concern for the small-value claimant can defeat the FAA's mandate in the arbitration of federal statutory claims. The Second Circuit has misinterpreted *Green Tree* as creating an end-run around the FAA, *Concepcion*, and *CompuCredit*.

Finally, *Green Tree* is inapposite here because, unlike the variable, contractual costs of arbitration discussed in that case, the class action waiver is not so much a creature of contract as it is a salient default feature of arbitration under the FAA, which envisions arbitration on an individual basis. *See Concepcion*, 131 S. Ct. at 1751, 1753. As noted above, parties must clearly agree to override this potent default term. *See Stolt-Nielsen*, 130 S. Ct. at 775. And even consensual classwide arbitration is *not* arbitration as contemplated by the FAA. *Concepcion*, 131 S. Ct. at 1753. In short, bilateral arbitration is part of the very fabric of arbitration under the FAA. Any adverse financial consequences flowing from enforcement of this default term should not be treated as the special costs of arbitration that are imposed by a particular agreement under a *Green Tree* analysis.

In sum, this Court's related precedent in *Concepcion*, *CompuCredit*, *Green Tree*, and *Mitsubishi* establish the clear legal principle that the financial consequences of enforcing a class action waiver can only be addressed by Congress, and not by the judiciary. Contrary to the Second Circuit's opinion, the vindication principle is limited to the special costs or burdens of arbitration that are imposed by agreement and that do not exist in court.

Such a harmonious interpretation of these related cases is necessary to honor the FAA's mandate, preserve the separation of powers, and preserve the strong federal presumption that an arbitration agreement creates a reasonable alternative forum for the vindication of federal statutory rights.

III. *CONCEPCION* DOES NOT BAR ALL COORDINATED EFFORTS TO ENFORCE THE RIGHTS OF SMALL-VALUE CLAIMANTS.

As argued above, *Concepcion*, *CompuCredit*, *Green Tree*, and *Mitsubishi* defeat the Second Circuit's decision invalidating the class action waiver. Quite apart from these legal arguments, however, amicus takes issue with the Second Circuit's rationale as a factual and practical matter. Is a class action really the only "economically feasible means for plaintiffs enforcing their statutory rights"? *In re Amex*, 667 F. 3d at 218.

Amicus thinks not. For example, *Concepcion* would not prevent similarly situated parties who are subject to a class action waiver from communicating with each other about their related claims and pooling their resources to hire a lawyer, fund expert fees, and share other costs associated with proving their claims. *See* Jacob Spencer, Note, *Arbitration, Class Action Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (2012) (responding to Second Circuit's conclusion in this case and suggesting "other economically feasible means of proceeding," such as where "similarly-situated plaintiffs could agree to split the costs of expert witnesses."). While the class action waiver requires that the parties proceed individually in the

arbitration of their claims, the class waiver says nothing about how the parties may *prepare* for their individual arbitrations.

Moreover, plaintiffs here are businesses and should be able to coordinate their arbitration efforts with relative ease. As the attorney who argued before this Court in *Concepcion*, on behalf of AT&T Mobility, has observed, "[i]n the context of *American Express*, where the potential claimants are organized businesses, there is a ready means for identifying and soliciting large numbers of antitrust claimants to file individual claims across which litigation costs can be manageably shared." Andrew Pincus, *Concepcion and the Arbitration of Federal Claims*, Bloomberg L. (Feb. 29, 2012), at 3 (*available at* http://www.mayerbrown.com/files/News/1b626009-2094-4d25-9a7b-dcc66a8bb6f6/Presentation/NewsAttachment/ed97993b-6f30-4e7a-b121-bdebb8a4c6bc/2%2029%2012%20-%20concepcion%20and%20the%20arbitration.pdf (as visited December 26, 2012)). And the vast resources of the internet should provide an accessible and convenient means for similarly situated parties in other kinds of cases to coordinate their arbitration efforts.

In short, there are many creative ways, unaffected by *Concepcion*, by which similarly situated claimants could combine forces and share the costs and burdens of proving their related claims, thereby overcoming the difficulties that the class action waiver may present to small-value claimants.

It should also be noted that *Concepcion* would not affect broad *public* enforcement of the statutory

rights of individuals who are subject to class action waivers, including the securing of victim-specific monetary relief. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002) (employee's arbitration agreement did not bar EEOC from seeking victim-specific relief). In fact, Congress has expressly authorized the States' attorneys general, in their capacity as *parens patriae*, to enforce federal antitrust laws and seek treble damages, injunctive relief, and reasonable attorneys' fees on behalf of their respective citizens.[10]

Quite apart from this express statutory grant, the Court has held that the *parens patriae* doctrine confers standing upon States' attorneys general to sue in federal court to enforce the federal statutory rights of their constituents whenever a State's "quasi-sovereign" interests are implicated, which include a state's "interest in the health and well-

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[10] 15 U.S.C. § 15c provides, in relevant part:

(a) Parens patriae; *monetary relief; damages*; prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure *monetary relief* as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. . . .

(2) The court shall award the State as monetary relief *threefold the total damage* sustained as described in paragraph (1) of this subsection and the cost of suit, including a reasonable attorney's fee.

(emphasis added).

being--both physical and economic--of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). See also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 663 (2012) ("[A]s a general matter, courts have allowed states to sue in parens patriae under federal statutes that create broad private rights of action but [that] are silent on the capacity of AGs, including Title VII of the Civil Rights Act of 1964, 42 USC § 1983, the Fair Housing Act, and the Americans with Disabilities Act, among others.") (footnotes and internal quotation marks omitted). And, of course, States' attorneys general have broad powers, under their respective State statutes and common law principles, to bring *parens patriae* suits in State courts and recover damages on behalf of their respective citizens. *See* Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. Chi. L. Rev. 345, 347-48 (2011) (discussing same).

When States' attorneys general lack the public resources necessary to litigate certain *parens patriae* suits, they have engaged the skilled services of private law firms, on a contingent-fee basis, to assist them in their enforcement actions. *See* Gilles & Friedman, *After Class*, 79 U. Chi. L. Rev. at 669 ("[S]tate AGs are, by and large, free to leverage the capital resources, expertise, and workforces of the private bar, on a no-cost basis. . . . [T]here is little to stop state AGs from engaging private law firms on a contingent fee basis to pursue claims in parens patriae on behalf of injured state residents.").

Concepcion should not affect these many available *parens patriae* enforcement opportunities.

A State's attorney general is neither a party to an arbitration agreement with a class action waiver nor an agent of a State resident who may be subject to such an agreement. Rather, a State's attorney general is asserting a quasi-sovereign interest as an independent agent of the State. *See* Gilles & Friedman, *After* Class, 79 U. Chi. L. Rev. at 664-65 (discussing *EEOC v. Waffle House*, 534 U.S. at 295-96).

In sum, there are many viable mechanisms of enforcement that should survive *Concepcion* and would allow for the vindication of the rights of parties with small-value claims. These avenues should ensure that such claims do not slip through the legal system.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Second Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AMERICAN EXPRESS COMPANY, et al.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF OHIO AND 21 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a private antitrust plaintiff is entitled to pursue an enforcement action in federal court, despite an arbitration clause in an agreement between the plaintiff and defendant, where the arbitration clause effectively bars cost-sharing with other plaintiffs and the claim undisputedly requires prohibitively costly expert fees, such that the plaintiff overcomes a presumption favoring arbitration by showing that it cannot "effectively [] vindicate its federal statutory rights in the arbitral forum." *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

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INTRODUCTION

No one doubts the importance of arbitration, and no one doubts the Court's and the Federal Arbitration Act's commitment to "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

At the same time, the Court has undoubtedly established an outer limit to that commitment: The arbitral forum is honored only "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985); *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (same). If such "effective vindication" of a claim is impossible in arbitration, a clause nevertheless demanding arbitration would amount to "a prospective waiver of a party's right to pursue statutory remedies," and the Court has indicated that it "would have little hesitation in condemning the agreement as against public policy." *Mitsubishi*, 473 U.S. at 637, n.19.

Here, the Court should affirm that this "effective vindication" requirement—though not easily invoked as a means to avoid arbitration—remains a vital principle. Nothing in the Court's arbitration cases has eliminated it, and the Court should not do so now.

Further, the Court should hold that this is, in fact, the rare case in which plaintiffs have shown that their rights cannot be effectively vindicated in arbitration. Here, the unavoidable, million-dollar cost of experts in a complex antitrust case, coupled

with a ban on the cost-sharing that would be enabled by classwide or even multiparty arbitration, amounts to a prohibitive fee on arbitration.

Finally, in assessing the effectiveness of vindicating an antitrust claim, the Court should consider the unique status of antitrust, in which every "private" case is designed to protect a broader public interest. That is not to say that antitrust claims are automatically exempt from arbitration, but only that their nature should be considered as part of a practical assessment of what "effective vindication" means. It means that the public interest in competition should be protected, and that interest is why the amici States support this cause.

STATEMENT OF AMICI INTEREST

The Amici States, along with private plaintiffs and the federal government, are part of a multipronged antitrust enforcement scheme. Petitioners' position threatens to weaken private enforcement—a key component of that scheme—and thus to erode the States' ability to protect their citizens and economies.

Congress passed the Sherman Act, 15 U.S.C. § 1 et seq., to recognize the importance of maintaining a competitive economy in the United States. *Mitsubishi,* 473 U.S. at 635. In order to ensure the statute's effective enforcement, lawmakers empowered federal agencies to pursue both criminal and civil sanctions against violators. *Id.* at 652. Moreover, Section 4C of the Clayton Act authorizes state attorneys general to bring civil antitrust actions for treble damages on behalf of the citizens of their respective states. 15 U.S.C. § 15c (a).

Not content to rely solely on government enforcement, however, Congress created a right of private action under the federal antitrust laws, to further the broad objectives of the law by both redressing private wrongs and protecting the public interest. *Mitsubishi Motors,* 473 U.S. at 635 (private cause of action plays central role in antitrust regime). The Court has recognized that enabling private antitrust enforcement "stimulates one set of private interest to combat transgressions by another without resort to government enforcement agencies," thus saving government the often hefty cost of antitrust litigation. *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 751 (1947).

A ruling in favor of Petitioners American Express Company, et al. ("AmEx"), threatens to disturb the enforcement balance that Congress created, increase the burden on government antitrust enforcement agencies, and materially harm the public interest.

SUMMARY OF ARGUMENT

The Court has repeatedly explained that arbitration clauses are enforced only "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28, quoting *Mitsubishi*, 473 U.S. at 637. The Court discussed the principle in *Mitsubishi* and applied it in both *Randolph* and *Gilmer*. In *Randolph*, the Court further specified that "effective vindication" could be precluded if a prospective litigant faced "the existence of large arbitration costs."

That rule remains a vital one, and the Court said nothing to undermine that rule in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), or *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Those cases did involve the unavailability of classwide arbitration, but neither involved the issue here regarding the effective-vindication rule. The Court should not abolish or restrict the effective-vindication rule now, as it serves the important purpose of protecting statutory rights and ensuring that arbitration commitments do not amount to advance waivers of substantive rights.

Here, the costs at issue do preclude effective vindication in arbitration, as the antitrust claims at issue could not be pursued without significant expert expenses. The ban on classwide or multiparty arbitration forces a sole plaintiff to bear expert costs alone. That barrier to cost-sharing renders those expenses a cost unique to arbitration. In other words, if litigation allows cost-sharing and arbitration does not, then the cost is arbitration-specific.

Finally, antitrust's unique nature should be considered in assessing "effective vindication." No "private" antitrust claim is truly private, and true vindication involves protection of competition and consumer interests, not merely an individual competitor's economic interests.

ARGUMENT

A. Federal law allows courts to approve court litigation, despite an arbitration clause, when necessary to "effectively vindicate" federal statutory rights.

The Court has repeatedly explained that arbitration clauses need not be enforced when a party shows that it cannot "effectively vindicate" federal statutory rights in the arbitral forum. None of the Court's cases enforcing arbitration clauses has eliminated that exception, nor should the Court now eliminate this critical safety valve.

1. *Mitsubishi*, *Randolph*, and *Gilmer* all preserve the right to litigate outside the arbitral forum when necessary.

The Court first described the "effective vindication" principle in *Mitsubishi*, 473 U.S. 614. While the explanation was dicta, it provided the road map for application in later cases. The *Mitsubishi* Court said that an arbitral forum was proper "so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum." *Id.* at 637. The *Mitsubishi* Court further noted that if an arbitration clause amounted to "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

The Court applied this "effective vindication" rule as a holding in *Gilmer*, 500 U.S. 20. In *Gilmer*, the plaintiff sought to overcome enforcement of an arbitration clause as to his Age Discrimination in

Employment Act claim. *Id.* at 27. He argued that he could not effectively vindicate his rights in arbitration.

The *Gilmer* Court confirmed that *Mitsubishi*'s "effective vindication" principle was a governing rule, *id.* at 28, and it proceeded to weigh the plaintiff's objections to arbitration. For example, the plaintiff complained that arbitrators might not issue written opinions, and that therefore the public would not know about the alleged discrimination. *Id.* at 31-32. The Court rejected that objection, noting that the regime at issue did "require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued." *Id.* The Court added that "the award decisions are made available to the public." *Id.* at 32. "Furthermore," said the Court, "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." *Id.*

The *Gilmer* Court considered and rejected several other objections that the plaintiff raised, *id.* at 30-32, and so it ultimately enforced the arbitration clause there. In other words, the Court found that the plaintiff *could* effectively vindicate his rights in arbitration, but it allowed the arbitration to proceed only after ensuring that was the case.

The Court again re-affirmed the "effective vindication" rule in *Randolph*, 531 U.S. 79, specifically noting that the costs of arbitration could be a barrier to effective vindication. The *Randolph* Court reiterated the *Mitsubishi/Gilmer* formulation

of the rule, and it reasoned that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. at 90.

The Court rejected Randolph's attempt to avoid arbitration, however, for the simple reason that Randolph did not *show* that she faced prohibitive costs. "But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter." *Id.*

Thus, while the Court rejected Randolph's attempt, it re-affirmed the "effective vindication" principle, and it reminded future parties that a plaintiff could "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," as long as the party meets its "burden of showing the likelihood of incurring such costs." *Id.* at 92. Because Randolph made no showing at all, the Court left open the question of "[h]ow detailed the showing of prohibitive expense must be before requiring the party seeking arbitration [to] come forward with contrary evidence." *Id.*

Taken together, *Mitsubishi, Gilmer,* and *Randolph* all show that the Court has firmly established the "effective vindication" principle as part of the federal substantive law of arbitrability. True, the plaintiffs in both *Gilmer* and *Randolph* failed to meet their burden of showing a barrier to effective vindication, so they failed to overcome the presumption favoring arbitration. But the more important point is not the inquiry's outcome in those cases; it is that the Court *conducted the inquiry.*

While the rule's existence ought not be at issue here—only its application—the Court's reaffirmation of the rule is important because AmEx seeks to diminish the rule's standing as precedent. It rightly notes that the *Mitsubishi* language was dicta, but it then overreaches and claims that *Randolph*'s application of the rule was mere dicta. E.g., Pet. Br. at 10 ("*Randolph*'s 'prohibitive costs' *dicta*"), *id.* at 18 (questioning "[w]hether or not *Randolph*'s *dicta* would ever suggest the crafting of a judicial exception to enforcement of the FAA").

AmEx's characterization of *Randolph* is wrong, as the Court necessarily affirmed the *existence* of the rule in looking to the record to see if Randolph had shown that he faced prohibitive costs. Further, in summarizing its conclusion, the Court compared its treatment of the issue to a parallel *holding* on a parallel issue:

> We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. . . . Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Id. at 91-92 (internal citations omitted). That is the language of a holding, not dicta. Finally, the Court further identified as an open issue the quantum of that burden, *id.* at 92, and identifying that narrower

issue as unresolved would make little sense if the rule's very existence were still an open question.

Equally important, even if AmEx could wish away *Randolph* as a holding, that does nothing to eliminate the clear holding of *Gilmer*—a holding that AmEx studiously avoids. AmEx cites *Gilmer* only for undisputed statements about the importance of arbitration generally, Pet. Br. at 3, 52, and for *Gilmer*'s reference to the unavailability of class arbitration in the scheme at issue there, *id.* at 9, 10, 22, 23. But nowhere does AmEx note *Gilmer*'s endorsement and application of the effective vindication rule. Nor does AmEx ever acknowledge the rule's existence.

Further, although AmEx never fully acknowledges that the rule ever existed, AmEx also suggests that the Court has already interred the "effective vindication" rule in *Stolt-Nielsen* and *Concepcion*. But, as shown below, those cases did nothing to undermine the rule.

2. Nothing in *Stolt-Nielsen* or *Concepcion* abolishes the narrow exception allowing litigation for "effective vindication" of rights.

AmEx repeatedly suggests that this case has already been resolved, in its favor, in *Stolt-Nielsen* and *Concepcion*. Not so.

First, neither case even mentions the "effective vindication" rule. Indeed, neither case cites *Randolph* at all, and each cites *Gilmer* just once, on other points. *Stolt-Nielsen*, 130 S. Ct. at 1775; *Concepcion*, 131 S. Ct. at 1749. Second, neither case involved the issue of vindicating federal

statutory rights, or the issue of avoiding arbitration altogether in order to achieve such vindication. In *Stolt-Nielsen,* the Court rejected an attempt to impose classwide arbitration, contrary to the parties' intent for any arbitration to be bilateral only. 130 S. Ct. at 1776. That makes sense, as the arbitral forum there was not designed to accommodate such a procedure. But refusing to impose class procedures within arbitration is distinct from allowing normal class action litigation to proceed in court. And in *Concepcion,* the Court rejected a state-law rule that forbade *all* class-action waivers as per se unconscionable. 131 S. Ct. at 1750-51. That rule against blanket waivers is entirely consistent with a case-specific assessment of whether effective vindication of a certain claim is possible in a particular arbitration scheme.

Indeed, properly understood, *Concepcion* supports Italian Colors, not AmEx. That is so because *Concepcion,* while refusing to impose class arbitration on an entire category of cases, also did not categorically reject arbitration in a class of cases. It left untouched the safety valve of the case-specific effective-vindication rule. AmEx essentially seeks the same type of overbroad categorical rule, but on the other side, asking the Court to bless *all* arbitration clauses without even conducting an effective-vindication inquiry. The Court should again reject such a categorical approach in favor of the type of scrutiny that preserves both the importance of arbitration and the need for the occasional limit.

3. The Court should not abolish the "effective vindication" rule.

The Court also should reject any attempt to abolish the "effective vindication" rule. AmEx does not expressly request such abolition (perhaps because it never fully accepts the rule's existence in the first place), but it implicitly does so.

For example, AmEx complains that litigants will far too easily escape arbitration, because, it says, anyone can find an expert to testify that the costs of arbitration will be prohibitive. Pet. Br. at 31-34. But this objection, by its nature, seeks invalidation of *any* exception on effective-vindication grounds, as it goes to the rule's existence, not to the quantum-of-proof level that the Court sets.

Likewise, AmEx complains that even if the party seeking arbitration prevails, the value of an arbitration clause is lost if the parties engage in collateral litigation about whether the clause applies. *Id.* at 33. At first blush, that might seem a fair point, as overbroad collateral litigation can have that effect. But the existence of *some* such litigation inheres in *any* type of exception to an arbitration clause. Indeed, what AmEx objects to is precisely what this Court did in *Randolph* and *Gilmer* before rejecting the attempts to avoid arbitration in those cases—it *considered* them. The only way to avoid fully such "collateral litigation" would be to approve arbitration clauses blindly without any examination on effective-vindication grounds of any sort. The Court should decline any such invitation.

Indeed, while the Amici States also support the application of the "effective vindication" rule

here, as explained below, our more important purpose is to urge the Court to retain the rule. That is, even if the Court finds that Italian Colors has not discharged its burden here, the Court should, as it did in *Gilmer* and *Randolph,* reiterate that arbitration cannot be imposed when no effective vindication is possible. It should leave the door open for future plaintiffs to at least have their partial day in court, to try to show why they deserve a full day in court.

B. The plaintiffs here showed that their rights could not be effectively vindicated in the arbitral forum.

The Court should affirm not only that the effective-vindication rule is alive and well, but also that Plaintiffs here met their burden of showing that their statutory rights could not be effectively vindicated in the arbitral forum provided in their agreement with AmEx.

As the Second Circuit explained below, the "evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Pet. App. 25a. On the cost side, Plaintiffs showed that their antitrust claim would require expert economists to show how the "honor all cards" policy amounted to a harmful tying arrangement; in particular, expertise would be needed to show the actual harm. Plaintiffs' expert on litigation costs testified that meeting this need would cost hundreds of thousands of dollars, perhaps reaching one million dollars. *Id.* at 25a-26a. On the recovery side, Plaintiffs showed that a typical recovery would be $1500-5000, and even the largest merchant's recovery would be "$12,850, or $38,549 when trebled." *Id.* at 26a. Thus, it would not be rational for any sole plaintiff to pursue bilateral arbitration.

Notably, AmEx does not seriously dispute the accuracy of plaintiffs' numbers in either part of the equation. It does not challenge the likely recovery amounts. It does not challenge the high costs needed for success, and more important, it does not allege

that success could be achieved with a budget less than the expected recovery range.

Instead, AmEx argues that proven expert costs, such as those here, should be categorically excluded from any effective-vindication formula. Pet. Br. at 40-45. AmEx insists that this Court's precedent requires consideration only of costs expressly imposed for *access* to the arbitral forum, such as an arbitrator's fee. *Id.* at 42. It says that the costs at issue do not fit under that umbrella, because they are not required for "accessing an arbitral forum," even if those costs "make it uneconomical to bring an individual claim." *Id.*

AmEx's view of countable costs, limited to "access" costs, is wrong as a matter of both precedent and common sense. First, the rule at issue is about *effective vindication* of rights. If a given scheme allows for only futile access, where a plainitff with a viable claim walks in the door predestined to lose, it cannot be said that the rights are effectively vindicated. Second, while the Court did discuss arbitral fees in *Randolph*, 531 U.S. at 91 n.6, it did so only after referring to the possibility that effective vindication could be precluded by "the existence of large arbitration *costs*" *id.* at 90 (emphasis added). Nowhere did the Court expressly or logically tie those costs to access fees.

Indeed, the expert costs here are, in effect, an arbitral-specific form of fee, precisely because the bar on classwide or multiparty arbitration would force any sole arbitrating plaintiff to bear the cost alone. In class litigation in court, the cost of an expert can be spread across the recovering class, or at least among joined plaintiffs without class certification.

But in arbitration, any plaintiff must bear the cost by itself. That is functionally equivalent to an entrance fee, however it is titled.

The costs here are also akin to an entrance fee because they are necessary to establish "antitrust injury," which is a threshold standing requirement unique to antitrust claims. That is, a private antitrust claimant must show not only that he was harmed and that his harm was caused by the alleged violation, but he must also specifically show that he suffered "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts illegal." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Thus, a private antitrust plaintiff in a case such as this not only faces heavy costs in trying to win his claim in arbitration, but often, he also faces such expenses in clearing this threshold, when, as here, the nature of the injury cannot be shown without expert analysis. And again, those costs cannot be shared or otherwise recouped under this particular arbitration scheme.

None of this is to say that the ban on class arbitration per se renders the arbitration clause unenforceable. After all, any claims that involve higher recovery, or lower costs to succeed, remain perfectly arbitrable in bilateral, non-class arbitration. Also, arbitration schemes that allow for cost-shifting or cost-sharing might effectively accommodate claims that are expensive to advance. Here, it is only the combination of factors—the sole-party requirement, the barriers to cost-shifting or cost-sharing, and the cost/recovery ratio—that

render the claim as a whole unable to be effectively vindicated.

The Court's cases are not only perfectly consistent with this approach, but more important, they exemplify it. For example, in *Gilmer*, as noted above, the Court countered objections about public knowledge of the process by pointing to the specifics of the public information provided there. 500 U.S. at 32. And in *Concepcion*, the Court detailed how the claims there were, in practical reality, quite economical to pursue in arbitration. 131 S. Ct. at 1744-45. The Court recounted the district court's description of how the minimum-recovery amount there, along with the cost-shifting system, made recovery in arbitration not only realistic, but made plaintiffs *better off in arbitration* than in court litigation. *Id.* Here, the Court should conduct the same pragmatic inquiry, and if it does, it should conclude that the balance tips against arbitration.

AmEx's contrary approach does not merely exclude Italian Colors from pursuing *this* claim, but it functionally amounts to an alternate route to abolishing the effective-vindication exception entirely. That is, under AmEx's conception of what costs count as a preclusive barrier, any arbitration clause will survive, as long as the entrance fee is low, *regardless of the statutory claim at issue or the impossibility of pursuing it.* That would mean that parties would be signing, and facing enforcement of, exactly the type of per se waivers of rights that *Mitsubishi* said would be unenforceable. That is not what the Court has said before, and it is not what the Court should say now.

C. Antitrust law is designed to vindicate the public interest in competitive markets generally, not just a private business's interest, and this goal should be considered in applying the "effective vindication" test.

The Court can and should balance both Congress's FAA policy of fostering arbitration and its Sherman Act goal of encouraging private parties to augment governmental enforcement efforts by bringing antitrust claims to the courts for resolution. In seeking the proper balance between these objectives, the courts have transitioned over the past four decades from exempting antitrust claims outright from arbitration, to the current state of the law, which provides an exception only when necessary to "effectively vindicate" federal statutory rights. While the State Amici are not advocating a return to the *per se* arbitration exception for antitrust claims, we do urge that the special nature of antitrust warrants some consideration in applying the "effective vindication" test. In looking to what rights are being effectively vindicated, courts should account for the public interest that is uniquely at stake in "private" antitrust cases.

Even as the law of arbitrability evolved to allow antitrust disputes to be arbitrated, the courts have never wavered in their recognition of the fact that private antitrust disputes are not truly private. *Mitsubishi Motors,* 473 U.S. at 635, quoting *American Safety Equipment Corp. v. J.P. Maguire & Co.,* 391 F.2d 821, 826 (1968) (claim made under the antitrust laws "is not merely a private matter"). Congress's dual purpose in creating the private right

of action under the federal antitrust laws was to provide redress to injured parties and to protect the public interest. *Id.*

Moreover, unlike most other types of commercial contract disputes that might arguably come within the purview of an arbitration clause, the resolution of antitrust claims is uniquely public-policy driven. It is well-settled that the purpose of the antitrust laws is to protect "competition, not competitors." *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). Indeed, even an act of "pure malice" perpetrated by one business against another does not alone state a viable claim under the antitrust laws if the competitive process was not harmed. *Brooke Group v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 225 (1993).

Thus, while the resolution of a contractual dispute over a missed shipment date or of a civil rights claim in an employment dispute may profoundly affect the parties to the dispute, the resolution of an antitrust claim affects the citizens and economy of the entire affected state or region. *Aimcee Wholesale Corp. v. Tomar Prods., Inc.,* 21 N.Y.2d 621, 627, 237 N.E.2d 223 (1968) (wrong decision on defective goods injures the parties to the dispute; wrong decision on an antitrust claim injures "the people of the State as a whole"); *see also American Safety Equipment Corp. v. J.P. Maguire & Co., Inc.,* 391 F.2d 821 (1968) (public interest is "pervasive" in antitrust cases).

The Amici States propose that courts, in applying the "effective vindication" test, consider whether the public interest in a private antitrust claim would be lost if the claim could not be

advanced at all in the arbitral forum, or could not be advanced in a way that effectively vindicates the public interest along with private interest. Such an analysis does no violence to the Congressional policy of encouraging arbitration, but rather best aligns that policy with the goal of fostering competition in the marketplace without frustrating either one.

The details of such consideration will have to be case-by-case, of course, as with the effective-vindication test generally. But at a minimum, it should call for consideration of whether the given claim is likely to be brought at all, as well as whether it will be brought in a way that includes the public interest. That requires a careful analysis of how the particular claim intersects with the particular arbitration scheme.

For example, courts should consider whether the relief available in the arbitral forum would benefit competition, and thus the market as a whole. A court could easily find that the public interest is served if the arbitrator may order injunctive relief that ends the offending behavior, whether monopolistic pricing, or a tying arrangement that drives up prices, and so on. Ending such behavior ultimately benefits consumers. However, if no such relief is available in arbitration, and the only relief would be reimbursement of the claimant—which might not be passed on to customers—that is a strike against finding "effective vindication."

Likewise, courts should consider whether the arbitration scheme is public or confidential, and whether the particular claim at issue raises concerns on that score. While confidentiality is often a benefit of arbitration, of course, the Court in *Gilmer* also

noted, as a factor favoring the arbitration scheme challenged there, that "the award decisions are made available to the public." See *Gilmer*, 500 U.S. at 32. The *Gilmer* Court also noted that most ADEA claims would not be subject to arbitration, allaying concerns about development of precedent. *Id.* Antitrust claims might differ from ADEA claims in that regard. If, as here, an antitrust claim is of the type that arises almost exclusively in contractual relationships, and if arbitration clauses are standard in the relevant contracts, that might raise a concern about whether the public interest is effectively vindicated if the challenged clause does not leave room for public knowledge of the charge. After all, private complaints can be the source of information leading to public investigation.

At the same time, courts should also consider whether the *particular* claim at issue raises such public-knowledge concerns, based on the facts of each case. Here, for example, public authorities have already pursued similar credit-card antitrust issues, separate from private enforcement. See Resp. Br. at 7 n. 4 (summarizing litigation). Therefore, this case does not seem to raise concerns about confidentiality versus public information, even if it is of a type that might otherwise raise such concerns. That demonstrates the careful, case-specific nature of the inquiry, as opposed to any categorical antitrust exemption from arbitration—or the type of blanket approval that AmEx seeks.

By contrast, the public interest in effective vindication might call for heavier consideration of the confidentiality factor in some consumer cases. If a particular claim intersects with an arbitration

scheme in a way that systemically prevents most consumers from learning of, let alone vindicating, their rights, such a systemic problem ought to be considered in the effective-vindication inquiry.

In the final analysis, a unique intersection of antitrust law and arbitration law is this: The same conditions that create an antitrust violation might also enable the type of improper arbitration clause that the Court "condemn[ed]" in *Mitsubishi* as "a prospective waiver of a party's right to pursue statutory remedies," 473 U.S at 637, n.19. That is, a monopolist, or parties in a horizontal agreement, might not only have the market power to maintain economic schemes that violate antitrust law, but might also use that same power to pressure others into accepting overly restrictive arbitration clauses, therefore insulating their behavior from being challenged in *any* forum. In some such scenarios, the clauses might be otherwise valid as to non-antitrust claims, and might not trigger an unconscionability finding. The effective-vindication rule, with special consideration for how it applies in antitrust cases, is a critical safety valve in ensuring that the valuable aims of the FAA are not distorted to thwart the equally valuable aims of federal antitrust statutes.

In sum, the unique status of antitrust claims can and should have a role in evaluation of effective-vindication claims. Here, because Italian Colors has already shown that it meets its effective-vindication burden of showing prohibitive costs under *Randolph*, the Court need not rely on the claim's status as an antitrust claim (apart from how that fact drives the cost problem). But the claim's antitrust nature further confirms what should already be the result

here, and the Court should recognize its role. That will guide courts in ensuring that the public interest in antitrust claims is effectively vindicated.

CONCLUSION

For the above reasons, the Court should affirm the Second Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

In the
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PROFESSIONAL ARBITRATORS AND ARBITRATION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This case involves question of substantial importance to the field of arbitration. *Amici* are professional arbitrators and scholars. They file this brief to give the Court the benefit of their many years of practical experience and scholarly study. In our view, the effective-vindication rule that pervades this Court's last 25 years of arbitration jurisprudence is crucial to promoting public confidence in the legitimacy of arbitration and furthering the federal policy favoring arbitration. Eradicating that rule will undermine arbitration's legitimacy and leave it a weakened institution in the eyes of the public. *Amici* include:

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

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SUMMARY OF ARGUMENT

The effective-vindication rule is an integral component of the Federal Arbitration Act (FAA), as this Court has recognized for more than 25 years. Petitioner's argument that the FAA requires enforcement of an arbitration clause even where it is undisputed that the consequence is that resolution of the underlying claims in arbitration is impossible, if adopted, will reduce public confidence in the arbitration system and leave it a more weakened institution.

First, the effective-vindication rule has long been treated as a necessary safety-valve to protect the legitimacy of arbitration, even by parties (and their *amici*) who have appeared before this Court to argue in favor of enforcing arbitration provisions. In *AT&T Wireless Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), petitioner asserted that a state rule forbidding procedures in contracts that precluded the effective vindication of statutory rights was precisely the kind of rule that FAA would not preempt. Similarly, petitioner in *Rent-a-Center West, Inc. v. Jackson* argued that allowing the delegation of unconscionability questions to the arbitrator was permissible because the effective-vindication rule would protect against abuse or unfair results. Thus, Petitioner's arguments that this Court's prior decisions compel reversal here are way off base.

Second, holding that arbitration clauses must be enforced even if the claims at issue cannot effectively be arbitrated will reduce public confidence in the arbitration system. The legitimacy of arbitration, a system that depends on consensual contractual

agreement, depends on public support and trust. A ruling for Petitioners here would set back arbitration in four main ways.

First, it would continue to drive down public support for arbitration. Evidence shows that while members of the public believe in arbitration as a general matter, their support for arbitration drops dramatically when they learn about the specific procedures, such as the one at issue here, that arbitration clauses often impose.

Second, it risks prompting a legislative or regulatory response that would limit arbitration in a much more categorical manner than would the nuanced, case-specific effective vindication rule. History shows that when Congress regulates arbitration, it tends to prohibit arbitration clauses in an entire category of contracts, even if many entities within those categories do not abuse the arbitration process. A decision eradicating the effective-vindication rule at a time when federal agencies such as the Consumer Financial Protection Bureau (CFPB) are currently considering whether to restrict the use of mandatory arbitration clauses gives rise to a serious possibility of a similarly categorical response. That would contrast sharply with the effective-vindication rule, which is a narrow safety-valve that is applied on a case-specific basis and that requires a party to meet a heavy evidentiary burden.

Third, even though many arbitration clauses do not preclude effective vindication of statutory rights, sanctioning Petitioner's arbitration clause would taint legitimate participants in the arbitration system by association. This would set back years of

work by arbitration providers and advocates to improve the image of arbitration in the eyes of the public. Since the early 1990s, arbitration groups have worked to develop due process protocols and other measures designed to ensure fundamental fairness in arbitration. The due process protocols have been transformational in bolstering public confidence in arbitration. Such endeavors will mean little, however, if claims cannot get to arbitration at all. If arbitration clauses are seen as a mechanism for preventing access to arbitration, then the public will perceive arbitration as illegitimate regardless of the well-honed processes that arbitration providers have in place to ensure fundamental fairness.

Finally, eradicating the effective vindication rule threatens to undermine the FAA's pro-contract goals. If parties realize that an arbitration clause will have exculpatory effects, they may be more reluctant to enter into contracts with arbitration clauses in the first place. This would reduce the use of arbitration and correspondingly increase the burden on judicial resources. Additionally, the existence of an effectively self-immunizing provision in an arbitration clause will reduce incentives for the opposing party to perform on its contractual obligations. If one party can breach with impunity, then the other party to the agreement has little incentive to carry out its own obligations.

Thus, the best way to protect arbitration is for this Court to reaffirm the vitality of the effective-vindication rule and to affirm the judgment below.

ARGUMENT

I. That Parties Can Effectively Vindicate Their Rights in the Arbitral Forum Has Been the Bedrock Assumption Underlying This Court's Recognition that the FAA Permits Arbitration of Statutory Claims.

As Respondent has persuasively shown, "[t]his Court has recognized the effective-vindication rule for as long as it has applied the FAA to federal statutory claims." Resp. Br. 19. *Amici* here agree with Respondent's description of this Court's quarter-century-long jurisprudence concerning arbitration of federal statutory claims. *Id.* at 19-28.

Amici wish only to make the additional point that parties seeking enforcement of their arbitration clauses in this Court in recent years have repeatedly relied on the safety valve of the effective-vindication rule to explain why enforcing the arbitration clause in those cases is consistent with the FAA. That they have done so underscores that an arbitration clause that prevents a party from access the arbitral forum at all has always been treated differently from other arbitration clauses that this Court has found enforceable. And there can be little dispute that, at bottom, that is exactly what this arbitration clause does—its cost provisions in combination with the requirement of bilateral arbitration make arbitration a non-viable alternative for Respondents.

For example, while Petitioner and its *amici* vigorously assert that this case is controlled by this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Pet. Br. 27-40,

they fail to acknowledge that the petitioner there used the effective-vindication rule as a justification for why the class-waiver in that case should be found enforceable. In *Concepcion*, the petitioner candidly acknowledged that not every procedural rule was incompatible with arbitration and that nothing in the FAA "precludes a state from imposing a general standard." Br. for Pet'r 46 n.19, *Concepcion*, 131 S. Ct. 1740, 2010 WL 3017755 (Aug. 2, 2010). The specific example that the petitioner gave of an acceptable general rule was "a requirement that the parties' chosen procedures ensure that claims *feasibly can be vindicated in arbitration*—so long as it leaves it to the parties to select those procedures." *Id.* (emphasis added). Likewise, the petitioner articulated the question presented as assuming that the effective-vindication rule was not at issue:

> Whether the Federal Arbitration Act preempts States from conditioning the enforceability of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—*when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.*

Id. at i (emphasis added). Thus, not only was the effective-vindication rule entirely off the table in *Concepcion*, the petitioner conceded that a general rule that predicated enforcement of a contract on the ability to effectively vindicate statutory rights would

not be preempted by the FAA. The case was litigated with the recognition that the effective-vindication doctrine was an integral and indisputably legitimate component of the FAA.

Similarly, the arguments presented in *Rent-a-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), reveal that a primary assumption underlying the dispute was that the effective-vindication rule would provide a crucial safeguard against arbitration clauses that denied access to the arbitral forum. There, the petitioner asserted that enforcing an arbitration clause delegating to the arbitrator the authority to resolve allegations of unconscionability was not problematic in part because the effective-vindication rule was in place to allow courts to resolve unconscionability questions when the assertedly unconscionable term had the effect of depriving a party of access to the arbitral forum. Reply Br. for Pet'r 17, *Rent-a*-Center, 130 S. Ct. 2772, 2010 WL 1554408 (Apr. 16, 2010). It acknowledged that

> [i]f a party meets the high hurdle of proving that the agreement does not provide access to arbitration and that the unconscionability defense hence cannot be decided in that forum, the court, as a threshold matter, could refuse to compel arbitration either in reliance upon this Court's decision in [*Green Tree Fin. Corp.–Ala. v.*] *Randolph* [531 U.S. 79 (2000)] or upon a finding that there is no "clear and

> unmistakable agreement to arbitrate arbitrability" . . . .

Id. Similarly, some of the same *amici* who happen to appear here to argue that the effective vindication rule is inconsistent with the FAA also appeared in *Rent-a-Center* and relied repeatedly on the effective–vindication rule to argue in favor of allowing arbitrators to decide gateway questions of unconscionability. *See, e.g.*, Br. of the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Pet'r 9, *Rent-a-Center*, 130 S. Ct. 2772, 2010 WL 783668 (Mar. 4, 2010) ("Far from permitting such interference, the FAA forbids any measures that frustrate the ability of parties to set the terms and procedures of arbitration, 'so long as the terms allow the prospective litigant effectively to vindicate his or cause of action in the arbitral forum.' *Gilmer [v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)] (internal quotation marks omitted); *Randolph*, 531 U.S. at 90."); *id.* at 27 (arguing that "decisions under the FAA[] make clear that an arbitration clause should not be refused enforcement merely for perceived, general unfairness *unless one party would effectively be deprived of access to the tribunal* (for example, by excessive fees) or would be unable to vindicate his claims (for example, because of excessive restrictions on remedies). See, *e.g.*, *Randolph*, 531 U.S. at 90-91; *Gilmer*, 500 U.S. at 28; *Mitsubishi* [*Motors Corp. v. Soler Chrysler–Plymouth, Inc.*], 473 U.S. [614,] 637 [1985].") (emphasis added).

The principle that the FAA does not require enforcement of arbitration clauses that deny access to any forum is an eminently sensible one and one that follows logically from the principles this Court applies to forum-selection clauses. Arbitration clauses are "a species of forum-selection clauses." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1783 (2010). This Court has explained that forum-selection clauses are presumed valid and will be enforced unless the party challenging enforcement meets its burden of showing that the clause is unreasonable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). But, as this Court emphasized, the party opposing enforcement "bear[s] a heavy burden," and will only succeed if it can show "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 17-18.

The effective-vindication rule, as applied to this case, provides a similarly narrow, but crucial, safety-valve. As with forum-selection challenges, the party raising the effective-vindication doctrine bears a "heavy burden" and will only succeed if it can show that particular arbitration term at issue will either deny it access to the arbitral forum or make it otherwise impossible to vindicate statutory rights in arbitration. There is nothing in the FAA that dictates a different result or that renders the effective-vindication rule void. Rather such a rule is an integral component of the FAA, and, as explained below, critical for bolstering public confidence in alternative dispute resolution and for promoting the federal policy favoring arbitration.

II. Finding the Effective-Vindication Rule To Be Inconsistent with the FAA Would Erode Public Confidence in Arbitration.

The effective-vindication rule, which helps guarantee that disputes which parties agree to arbitrate actually can be settled in arbitration, furthers the FAA's basic purposes. If this Court were to require enforcement of arbitration clauses, even where, as here, the specific terms of the arbitration clause preclude one party from accessing the arbitral forum, such a ruling may cause the public to lose confidence in arbitration as a legitimate mechanism of dispute resolution. This in turn could result in a legislative or administrative backlash against arbitration and thus reduce the availability of arbitration as a dispute resolution mechanism going forward. The adverse effect on the public's view of the integrity of arbitration can be seen in several ways.

A. Eliminating the Effective-Vindication Rule Will Reduce Public Support for Arbitration.

Eliminating the effective vindication rule may lower public opinion of the legitimacy of arbitration. Courts have recognized the importance of the rule in maintaining the integrity of the arbitration system. Without a rule safeguarding against arbitration clauses that make arbitration impossible, the institution of arbitration is inevitably weakened. As one court explained:

> [A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. *Gilmer*, 500 U.S. at 28. This supposition falls apart, however, if the terms of the arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

Shankle v. B-G Maintenance Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999).

Similarly, the drafters of the Revised Uniform Arbitration Act ("RUAA") recognized that the legitimacy of arbitration rests on the bedrock assumption that arbitration will be an adequate forum for enforcing the legal rights of disputants. In one comment, the drafters explained that it is critical for courts to "ensure the fairness of an agreement to arbitrate, *particularly in instances involving statutory rights that provide claimants with important remedies.*" RUAA § 6, cmt. 7, 7 U.L.A. 28 (2000) (emphasis added). The comment stresses that courts "should determine that an arbitration process is adequate to protect important rights" because "[w]ithout these safeguards, arbitration loses credibility as an important alternative to litigation." As this Court has recognized that the RUAA "incorporate[s] the holdings of the vast majority of state courts and the law that has developed under the [FAA]," *Howsam v. Dean Witter Reynolds, Inc.*,

537 U.S. 79, 84-85 (2002), the drafters' careful consideration of how principles like the effective-vindication rule bolster arbitration's credibility should not be taken lightly.[2]

That a ruling in favor of Petitioners would undermine the legitimacy of arbitration also is evident from the fact that what reduces public confidence in arbitration is not anything inherent to arbitration, but the specific procedural terms (like Petitioner's here) that many entities include in their arbitration clauses. Eliminating the effective-vindication rule would turn a public that wants to support arbitration into one that believes arbitration to be illegitimate. Recent evidence shows that while members of the public believe in arbitration in general and desire a system that provides a faster and more efficient alternative to litigation, their support for arbitration plummets upon learning about specific procedural limitations that parties like Petitioner often insert into their arbitration clauses.

A recent study conducted by the Pew Charitable Trusts is revealing. *See* Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers, and*

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[2] The RUAA, which was prepared by a blue-ribbon panel of arbitrators, attorneys, and scholars interested in alternative dispute resolution, has been widely celebrated as a "worthy, and overdue, effort to modernize our arbitration laws." Samuel Estreicher & Kenneth Turnbull, *Revised Uniform Arbitration Act Approved*, N.Y.L.J., Nov. 2, 2000, at 3. The RUAA was endorsed by numerous arbitration organizations, including the American Arbitration Association, JAMS, and the National Academy of Arbitrators, as well as by the ABA. Francis J. Pavetti, *Why States Should Enact the Revised Uniform Arbitration Act*, 3 Pepp. Disp. Resol. L.J. 443, 444 n.2 (2003).

Checking Account Dispute Resolution (2012).[3] This past summer, Pew conducted a national survey of checking account holders regarding their attitudes toward arbitration. It found that a majority of those surveyed supported the idea of arbitration as a way to streamline the justice system and to provide a simpler and less costly way to resolve a dispute. *Id.* at 10. It also found, however, that "consumers across age, gender, race, income, education, and political affiliation overwhelmingly find the components that constitute the arbitration process unacceptable." *Id.* at 7. Eighty-eight percent of respondents found the "majority of the procedural components of arbitration [described to them] unacceptable." *Id.* at 10.

In other words, the public believes that arbitration is fair and legitimate until it learns about the actual provisions that are inserted into many arbitration clauses. Petitioner's arbitration clause is precisely the kind that is likely to invoke public disapproval, because it imposes procedural roadblocks that remove arbitration as a viable alternative to court. Indeed, while those surveyed want an arbitration system that provides a less-costly alternative to litigation, *id.*, it is undisputed that Petitioner's arbitration clause makes arbitration cost-prohibitive. A ruling from this Court sanctioning arbitration clauses like Petitioners will simply feed the view that arbitration is not a legitimate form of dispute resolution.

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[3] The Pew Study is *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf

B. Eliminating the Effective-Vindication Rule Threatens to Spur Legislative and Regulatory Action that Will Place Much More Categorical Restrictions on Arbitration Than are Imposed by the Narrow, Case-Specific Effective-Vindication Rule.

Second, eradicating the effective-vindication rule threatens not only to reduce public confidence in arbitration, but also to prompt federal legislation and rule-making that could limit or restrict the FAA's reach. Far from promoting the "federal policy favoring arbitration," a ruling for Petitioners would thwart it.

The effective-vindication strikes the proper balance between promoting the arbitration of statutory claims and protecting the underlying statutory rights at issue in a dispute. The rule is case-specific, not categorical. It appropriately requires a heavy burden to satisfy, and as Respondent notes, has been met in only a handful of cases. Resp. Br. 28-33.

Any rule or statute enacted to address arbitration, by contrast, will not be nearly as nuanced. Legislation and administrative rules are by their nature categorical and provide no easy mechanism for fact-specific, case-by-case analysis. Congressional and agency reform thus casts a much-wider net than does the effective-vindication rule.

Indeed, the recent history of arbitration legislation shows that when Congress acts, it tends to restrict arbitration with respect to an entire category

of contracts, even though many of the entities or individuals within those categories may utilize balanced, legitimate arbitration clauses that have not been called into question. Since 1996, Congress has (1) prohibited pre-dispute arbitration clauses in contracts between franchised automobile dealers and automobile manufacturers, 15 U.S.C. § 1226; (2) prohibited pre-dispute arbitration clauses in consumer credit contracts to active duty military personnel or their dependents, 10 U.S.C. § 987(e)-(f); (3) authorized livestock and poultry farmers to decline any arbitration requirement in a contract with a livestock or poultry purchaser, 7 U.S.C. § 197(c); and (4) imposed a condition on federal defense contractors that they not require their employees to arbitrate claims of employment discrimination, or torts such as assault and battery, intentional infliction of emotional distress, harassment, and negligent supervision, hiring and retention. Pub. L. 112-10, 125 Stat. 38, 79 (Apr. 15, 2011).

Most recently, Congress enacted the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which regulates arbitration in several ways. It limits the use of arbitration agreements with regard to certain whistleblower claims, 18 U.S.C. § 1514A(e)(2), and also amends the Truth-in-Lending Act (TILA) to prohibit the use of arbitration to resolve claims involving residential mortgages and open-ended consumer credit plans. 15 U.S.C. § 1639c(e)(1).

The Act also gives several agencies authority to promulgate rules limiting or prohibiting the use of mandatory arbitration in areas where Congress

perceived that arbitration was being misused by parties seeking to gain an unfair advantage over their contracting counterparts. It authorizes the Securities and Exchange Commission to limit arbitration agreements between investors and broker-dealers with respect to claims arising out of federal securities laws. 15 U.S.C. § 78(o). Similarly, the Act requires the Consumer Financial Protection Bureau (CFPB) to conduct a study and report to Congress concerning arbitration agreements in connection with consumer financial services. 12 U.S.C. § 5518(a). The Act further authorizes the CFPB to limit or prohibit a mandatory arbitration agreement if it finds, consistently with its study, that such limitations are in the public interest and will help protect consumers. 12 U.S.C. § 5518(b).[4] In short, Congress has traditionally taken a meat-axe approach to regulating arbitration. This stands in sharp contrast to the scalpel-like precision of the effective-vindication rule.

The notion that eradicating the effective-vindication rule could trigger a legislative or administrative response is not merely an academic one. The CFPB currently is in the process of

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[4] Congress also has recently considered several other bills that would similarly regulate arbitration as applied to entire categories of contracts. The Fairness in Nursing Home Arbitration Act, which was introduced last year, would prohibit mandatory arbitration in nursing home agreements. H.R. 6351, 112th Cong., § 2 (2012). Similarly, a bill introduced in the 110th Congress would amend the Uniformed Services Employment and Reemployment Rights Act to prohibit pre-dispute mandatory arbitration agreements in employment contracts subject to the Act's purview. H.R. 7178, 110th Cong., § 3 (2008).

completing its fact-finding regarding arbitration and is now considering both whether to promulgate rules and what the content of those rules will be. It is highly plausible that the CFPB will take this Court's decision into account, whatever that decision may be, in constructing its proposed rules. Indeed, a finding that the FAA requires enforcement of an arbitration clause even where the clause prevents a party from vindicating his or her statutory rights bears directly on whether arbitration "is in the public interest and for the protection of consumers." 12 U.S.C. § 5518(b). If the CFPB does act, it stands to reason that its rules will not be nearly as nuanced as the effective-vindication rule. As Respondents have persuasively explained, the effective-vindication rule harmonizes the pro-arbitration policies of the FAA with the substantive goals of the federal statutes that parties seek to enforce through arbitration. Resp. Br. 13. Eliminating the effective-vindication rule not only disrupts that harmony, but could lead agencies like the CFPB to respond with much more categorical restrictions on arbitration. In other words, Petitioner's position, if adopted, would weaken arbitration back rather than strengthen it.

C. Eliminating the Effective-Vindication Rule Would Set Back the Cause of Arbitration by Undoing Years of Work Designed to Improve the Legitimacy and Public Perception of Arbitration.

Third, adopting Petitioner's interpretation of the FAA will cast a pall not just over arbitration clauses that deny parties the ability to effectively vindicate their statutory rights in arbitration, but over arbitration more generally. To be sure, the vast majority of arbitration clauses are carefully drafted and do not run afoul of the effective-vindication rule. At the same time, sanctioning the use of those few arbitration clauses that are truly exculpatory creates the all-too-real possibility of tainting by association other arbitration users and providers, the vast majority of which are legitimate, honest participants in the alternate dispute resolution system.

Again, this possibility is not merely theoretical. The example of the National Arbitration Forum (NAF) demonstrates how the bad acts of a single entity can spill over and harm the legitimate uses of arbitration, and hence the pro-arbitration goals of the FAA. Prior to 2009, NAF was the leading forum for debt-collection arbitrations. Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, Bus. Wk., Jun. 5, 2008 (noting that NAF conducted more than 200,000 arbitrations per year). NAF's arbitration activities came to a crashing halt in 2009 when the State of Minnesota filed a lawsuit revealing that NAF was infected by a massive conflict of interest. Complaint, State of Minnesota v. National

Arbitration Forum, et al., No 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009).[5] In short, NAF was owned by one of the nation's largest debt collectors, Mann Bracken, which itself was bringing more than 125,000 arbitrations per year in front of NAF. *Id.*, ¶ 3. Soon after the State filed suit, NAF entered into a consent decree in which it agreed to immediately cease its consumer arbitration business. Consent Decree, State of Minnesota v. National Arbitration Forum, et. al., No 27-CV-09-18550 (July 17, 2009).[6]

What is important here is not NAF's misconduct itself, but the ripple effect that its conduct set in motion. Just days after NAF entered into its consent decree, the American Arbitration Association (AAA), one of the nation's leading arbitration providers, declared that it would impose its own moratorium on administering consumer debt arbitrations, even though there was never any allegation that AAA had any conflict of interest. J.P. Duffy, *NAF and AAA Stop Administering Consumer Debt Arbitrations: Was the Arbitration Fairness Act of 2009 the Catalyst for the AAA's Decision?*, Int'l Arb. Newsletter (Aug. 13, 2009).[7] Although AAA indicated that part of its

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[5] The full text of this complaint can be found at: http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf

[6] The full text of the Consent Decree can be found at: http://pubcit.typepad.com/files/nafconsentdecree.pdf

[7] This article is *available at* http://www.dlapiper.com/naf-and-aaa-stop-administering-consumer-debt-collection-arbitrations:was-the-arbitration-fairness-act-of-2009-the-catalyst-for-the-aaas-decision/.

reason for imposing the moratorium was the need for improved due process protocols for debt-collection arbitrations, its decision also came after congressional hearings that "portrayed the NAF as a sham organization that simply rubber-stamped creditors' claims, [and] then suggested the AAA was guilty by association." *Id.* Additionally, even though NAF is just a single entity, its actions stoked fears that the arbitration system remained "ripe for abuse" because other bad actors were waiting to come fill its place. *Staff of Subcomm. on Domestic Policy of H. Comm. on Gov't Reform, Report on Arbitration Abuse*, at 10 (July 21, 2009).

The taint by association that could arise from siding with Petitioner would set back many years of effort by arbitration providers to develop standards and protocols that would enhance arbitration's public reputation and combat lingering hostilities to arbitration. Those standards will mean little, however, if the public perceives arbitration clauses as a way of keeping disputes *out of* arbitration rather as a way of moving them *into* arbitration.

Starting in the early 1990s, arbitration proponents and providers began to develop a set of due process standards for workplace arbitrations, acknowledging that while many employers adopted "serious and fair" arbitration clauses, some others did not. Searle Civil Justice Inst., *Consumer Arbitration Before the American Arbitration Association:*

Preliminary Report at 17 (Mar. 2009).[8] Notably, the primary driving force for the protocols was this Court's holding in *Gilmer*, 500 U.S. 20, affirming that statutory employment claims could be resolved in arbitration. Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 Ohio St. J. on Disp. Resol. 369, 374-75 (2007). Once it became clear that the FAA generally permitted arbitration of federal statutory claims, arbitration providers realized that they should develop standards to ensure that statutory claims could be resolved fairly. *Id.* at 374-91. These early efforts subsequently led arbitration providers such as AAA to develop, *inter alia*, employment due process protocols, consumer due process protocols, and health care due process protocols. Searle Civil Justice Inst., *supra*, at 17-19. All of the protocols have the primary goal of ensuring "fundamental fairness" in arbitration and include multiple principles designed to promote that goal. *Id.* at 19.

Those protocols, which took years to develop and which were the subject of extensive study, have been enormously successful in improving the reputation of arbitration as a legitimate and cost-effective alternative to litigation. *See, e.g.*, Harding, *supra*, at 369-71 (acknowledging that the protocols "have had a tremendous impact on arbitration" and that they have helped to "legitimize the prevalent and growing use of pre-dispute arbitration clauses," in both

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[8] This document is available at https://www.aryme.com/docs/adr/2-2-1235/informe-sealy-aaa-eeuu-2009-us-sealyreport-aaa.pdf

bargained-for and adhesive contracts). They have influenced courts, legislatures, and public opinion. *See id.* at 371. AAA notes that its consumer due process protocol "has been cited or discussed in over 140 journal and law review articles in addition to various state and federal court decisions . . . ." American Arbitration Association, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection: Due Process Protocol and Statement of Principles* 2 n.2 (Oct. 2010).[9]

The due process protocols can only provide for fair arbitration of statutory claims if those claims can reach arbitration in the first place. Yet Petitioner would have this Court enforce its arbitration clause even where it is undisputed that the clause would preclude the parties from proceeding in arbitration. Equally important, because eliminating the effective-vindication rule enables parties to keep disputes from reaching arbitration at all, such a rule makes arbitration appear illegitimate notwithstanding that arbitration providers have standards in place to ensure fair resolution of statutory claims. If claims cannot get to arbitration at all, then there is nothing that arbitrators or arbitration providers can do to demonstrate the legitimacy of their processes. Rather, as long as the public perceives the arbitration system as permitting procedural terms in arbitration clauses that make the effective

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[9] This document is *available at* http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003865&revision=latestreleased.

vindication of statutory rights impossible, they will question the legitimacy of arbitration no matter what arbitration providers do to ensure that once a statutory dispute reaches arbitration, those statutory rights can be effectively vindicated. As a result, eradicating the effective-vindication rule could undo years of efforts to make arbitration more accessible, more transparent and more legitimate.

The fact that arbitration due process protocols do exist and that arbitrators are required to follow the law also undermines the claim of Petitioners' *amici* that effective vindication is possible in this case. Several *amici* assert that the bilateral arbitration requirement is not cost prohibitive because while expert testimony might be required for a court action, experts may not be necessary to the same degree for pursuing complex antitrust claims in arbitration because of arbitration's streamlined processes and greater procedural flexibility. *See, e.g.*, Br. of Distinguished Law Professors as *Amici Curiae* in Support of Petitioners 8-11. But that premise is flawed. Arbitrators are not free to ignore governing law. An arbitration award can be vacated if arbitrators disregard their obligations, exceed their authority, or are tainted by bias. 9 U.S.C. § 10(a); *cf. Stolt-Nielsen*, 130 S. Ct. at 1768 n.3 (declining to decide whether "manifest disregard" of the law is a valid ground for vacating an arbitration award, but finding that the arbitrator's decision to authorize class arbitration would satisfy the manifest disregard standard). If established substantive law requires expert testimony as a pre-condition to finding antitrust liability in court, then that case law would

apply equally to an antitrust arbitration. Thus, *amici*'s own arguments contribute to the public perception that arbitration can be a lawless enterprise when in reality it is nothing of the sort.

D. Eliminating the Effective-Vindication Rule Is Inconsistent with the FAA's Pro-Contract Purposes.

Finally, holding that the effective-vindication rule is incompatible with the FAA could undermine arbitration by (1) discouraging parties from entering into contracts with arbitration agreements ex ante, and (2) incentivizing parties to walk away from performing on their substantive contractual obligations once they realize that their counter-parties cannot be held accountable for their own breaches. First, without the safety-valve that the effective-vindication doctrine provides, parties will have to decide ex ante whether they can afford to take the risk of entering into a contract under which they will not be able to effectively vindicate their rights in any forum, arbitral or otherwise. This will likely discourage some parties from entering into agreements to arbitrate in the first place, thereby depriving those parties (and their counter-parties) from the many benefits of alternate dispute resolution and pushing more disputes into the legal system. This in turn will impose greater burdens on courts, drive up litigation costs and reduce the use of arbitration. Such an outcome would run counter to the strong federal policy favoring arbitration.

In the same vein, parties that do end up in contracts that contain exculpatory arbitration agreements will have little incentive to perform on their underlying contractual obligations. If party A discovers that party B can breach without any mechanism for being held accountable, then party A has no reason to hold up its end of the bargain. In his foundational study on cooperation, Robert Axelrod found that rational actors have a strong incentive not to cooperate, and that the risk of reciprocal punishment for non-cooperation, the so-called "tit-for-tat" paradigm, was one of the most efficient means of keeping actors honest. *See generally* Robert Axelrod, The Evolution of Cooperation (1984). But where only one party is capable of enforcing its contractual rights, that reciprocity disappears. The lack of mutually-assured enforcement will encourage parties to walk away from the contract or willfully breach if they start to worry that the other party may default on its own obligations. Given that this Court has repeatedly recognized that a primary purpose of the FAA was to promote enforcement of contractual agreements, *see, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985), a rule that reduces incentives for contractual performance undermines the Act's contractual goals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-133

In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *ET AL.*,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are distinguished scholars and professors of law from leading law schools around the nation.[1] *Amici* have taught, lectured and written extensively on a variety of areas of the law, including civil procedure and complex litigation. Among other things, *Amici* are keenly interested in ensuring that our nation's legal system and processes continue to fulfill the Constitution's promise of providing full and equal access to justice for all citizens.

In *Amici's* view, the Second Circuit's decision below should be affirmed because, otherwise, drafters of arbitration provisions will have the ability to use arbitration agreements to deprive citizens of their First Amendment right to access justice. If arbitration agreements are enforced against small business owners and other citizens seeking to enforce statutory rights who demonstrate that they cannot rationally pursue those claims in individual arbitration, those claimants will be forced

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici Curiae* or its counsel made a monetary contribution to the preparation or submission of the brief.

to abandon their claims and, as a practical matter, will be denied access to both a court and a valid alternative dispute resolution forum.

This Court made clear in *AT&T Mobility LLC v. Concepcion* that the objective of the FAA is to "promote arbitration." 131 S. Ct. 1740, 1749 (2011). Blindly enforcing any and all arbitration agreements even against citizens who cannot rationally access arbitration cannot serve the FAA's objective because the end result will be that no arbitration takes place at all. Affirming the Second Circuit's decision below will promote the FAA's objective because it will encourage the use of arbitration provisions designed to enable all claimants to effectively vindicate their statutory rights in arbitration and lead to ever-increasing use of arbitration as an alternative forum for accessing justice. Reversing the Second Circuit will engender the use of arbitration clauses that make it more costly and difficult for claimants to vindicate their rights in arbitration and, consequently, will lead to less arbitration, not more.

The right to access justice is not reserved for the wealthy and powerful, or for those who are economically irrational. All citizens possess the same right. Unless the Court upholds the circuit court, however, that right will in short order become effectively foreclosed to many of us. *Amici*, therefore, respectfully urge the Court to affirm.

The *Amici* Professors of Civil Procedure are:

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SUMMARY OF ARGUMENT

I. The Federal Arbitration Act ("FAA") was enacted to promote arbitration among contracting parties who agree to resolve their post-contractual disputes by way of streamlined proceedings in a non-judicial tribunal. The FAA was not enacted to enable one contracting party to deny access to justice to small business owners or other litigants who cannot rationally access arbitration. An order compelling such a litigant to arbitrate, by definition, fails to serve the FAA's pro-arbitration purpose because the practical result of that directive will be that no arbitration takes place at all. Thus, all such an order can realistically achieve is to deny access to justice to such claimants, thereby depriving them of their First Amendment right of petition. Such an outcome would also violate this Court's precedents providing that arbitration clauses may not be used, overtly or in practice, to prospectively waive a citizen's substantive statutory rights. In the present case, it would also undermine Congress's intent to enlist private attorneys general to help enforce the federal antitrust laws.

By ruling that arbitration agreements should not be enforced if persuasive record evidence demonstrates that it would be economically irrational for the party resisting arbitration to arbitrate, the Second Circuit's decision in *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("*Amex*"), appropriately balances the FAA's pro-arbitration objectives, the First Amendment right to access justice, and the need to preserve citizens' statutory rights, while giving full

effect to Congress's intent to install and maintain a robust private antitrust enforcement mechanism.

II. *Concepcion* is perfectly consistent with this Court's vindication of statutory rights precedents. *Concepcion* involved individual claimants who *could* enforce their statutory rights in arbitration and, thus, it did not contemplate the present situation, where the Second Circuit found as a matter of law that the individual claimants cannot do so. Petitioners have fundamentally misread the case. Assuming *arguendo* that it applies outside of its state law preemption context at all, *Concepcion*, provides that when a claimant *can* vindicate his or her rights in individual arbitration, the claimant's procedural right to serve as a class representative to enforce the rights of others cannot trump the defendant's statutory right to arbitrate under the FAA. *Concepcion*, therefore, is easily reconciled with this Court's vindication of rights precedents, and the Second Circuit correctly concluded that *Concepcion* does not compel arbitration in the present case.

III. Affirming the Second Circuit's decision will advance the FAA's objectives by encouraging those who are genuinely interested in arbitration's dispute resolution benefits to fashion provisions that make arbitration increasingly viable for small dollar claimants. In contrast, reversing *Amex* would result in courts blindly compelling arbitration against claimants who cannot rationally pursue arbitration, which would lead to widespread use of consumer-unfriendly arbitration clauses and less arbitration.

Congress has never enacted a statute expressly stating that "contracting parties may prospectively waive their civil liability under the antitrust laws and deprive their counter-parties of their First Amendment right to sue for statutory violations." The FAA does not expressly permit either of those things, and this Court should decline Petitioners' invitation to, in essence, write those words into the statute by ruling that Congress silently intended the FAA to have those effects.

ARGUMENT

I. Compelling a Small Business Owner to Arbitrate When It Cannot Rationally Pursue Arbitration Does Not Advance the FAA's Objectives, Denies Citizens Access to Justice, and Undermines Congress's Intended Antitrust Enforcement Mechanism.

A. Congress enacted the FAA "to promote arbitration." *Concepcion*, 131 S. Ct. at 1749. To counter "judicial hostility to arbitration agreements," *id.* at 1745 (citation omitted), Congress declared an "emphatic federal policy" favoring "arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985); *see Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The "overarching purpose" of the FAA, accordingly, "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" in a non-

judicial forum. *Concepcion*, 131 S. Ct. at 1748. While the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" *id.* (brackets in original) (citations omitted), that purpose does not stand alone – because the whole "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute," *id.* at 1749.

An order compelling litigants to arbitrate when the record shows that they cannot rationally do so will not serve Congress's pro-arbitration policy because it will result in no arbitration at all. An order compelling an arbitration that as a practical matter cannot be filed will not lead to an "arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, and will not "facilitate streamlined proceedings" in an alternative forum, *Concepcion*, 131 S. Ct. at 1748. Thus, it cannot further Congress's purpose for enacting the FAA. Such an order will instead lead to the abandonment of the litigant's claims – a result that "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore [ought] not be required by [federal] law." *Cf. id.* at 1753.

Compelling a small business or other litigant to arbitrate when it cannot rationally do so can only work to deprive the litigant of access to justice. Depriving citizens of access to justice is not the purpose of the FAA. Accordingly, this Court has held that agreements to arbitrate cannot be used to compel a party to "forgo the substantive rights afforded by [a] statute," *Mitsubishi*, 473 U.S. at 628, and that arbitration can be ordered only if it

provides a *valid* alternative to a judicial forum in which "the prospective litigant effectively may vindicate" its rights, *id.* at 637; *see Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("claims arising under a statute designed to further important social policies may be arbitrated ... 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum'") (brackets in original) (citations and some internal quotations omitted).

An arbitration agreement is "a specialized kind of forum-selection clause," *Mitsubishi*, 473 U.S. at 630, and any contractual forum selection clause – even one selecting arbitration – can be set aside if "proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court,'" *id.* at 632 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)) (brackets in original).

The principle that a litigant will not be compelled to arbitrate if it cannot as a practical matter enforce its statutory rights in the arbitral forum has been endorsed by a majority of the current members of this Court. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (Supreme Court should not "resolve in the first instance" whether agreement bars parties "from 'effectively vindicating' their 'federal statutory rights in the arbitral forum'") (Thomas, J.; joined by Roberts, C. J., and Scalia, Kennedy, Alito, JJ.) (quoting *Randolph*, 531 U.S. at 90). *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (Kennedy,

J.; joined by Scalia, Thomas, Ginsburg, JJ.) ("Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies ..., we would have little hesitation in condemning the agreement as against public policy.'") (quoting *Mitsubishi*, 473 U.S. at 637 n.19) (other citation omitted).[2]

Hence, the rule that an arbitration clause cannot be used prospectively to divest citizens of statutory rights is a bedrock principle of federal arbitration law. In *Sutherland v. Ernst & Young LLP*, citing decisions of this Court, Judge Wood cogently summarized the vindication of rights rule and its premises:

> Although federal policy strongly favors arbitration as an alternative means of dispute resolution, the arbitration of a statutory claim will be compelled only if that claim can be effectively vindicated in the arbitral forum. Otherwise, the statute's remedial and deterrent function would be circumvented, and the arbitral forum would lose its claim as a valid alternative to traditional litigation. Thus, where large arbitration costs preclude a litigant from effectively vindicating her statutory rights in the arbitral forum, the

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[2] Because a litigant who cannot rationally arbitrate will abandon its claims, there will be "no subsequent opportunity," *id.*, for judicial review of the order compelling arbitration.

> arbitral agreement at issue may be unenforceable.

768 F. Supp. 2d 547, 549-50 (S.D.N.Y. 2011) (internal quotations, citations, and alterations omitted). There is no basis under the FAA or this Court's precedents to retreat from these long-standing principles and decree a new rule of law that blindly enforces arbitration agreements, even when doing so would not advance the FAA's pro-arbitration objectives.

B. There is certainly no valid reason to blindly enforce arbitration agreements against litigants who cannot rationally arbitrate if the result would be to deprive citizens of access to justice. "In an organized society," the right to access justice "is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship ...." *Chambers v. Baltimore & Ohio R.R Co.*, 207 U.S. 142, 148 (1907). "The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983); *accord Daniels v. Arcade, L.P.*, 477 F. App'x 125, 130 (4th Cir. 2012) ("The right to sue and defend in the courts ... is granted and protected by the Federal Constitution.") (quoting *Chambers*, *supra*). "'The right of petition is one of the freedoms protected by the Bill of Rights,'" and "[t]he right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transp. Co. v. Trucking*

Unlimited, 404 U.S. 508, 510 (1972) (internal quotations and citations omitted).

This fundamental right of all citizens to access justice is grounded in the First Amendment:

> The First Amendment provides ... that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," ... and have explained that the right is implied by "the very idea of a government, republican in form."

BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002) (citations omitted). This Court, therefore, will "not 'lightly impute to Congress an intent to invade ... freedoms' protected by the Bill of Rights, such as the right to petition ... 'all departments of the Government,'" including "'the right of access to the courts....'" *Id.* at 525 (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961), and *California Motor Transp. Co.*, 404 U.S. at 510) (other citation omitted).

This Court's precedents during the quarter century between *Mitsubishi* and *Pyett* honor these fundamental First Amendment principles; indeed, this Court's decisions are inherently guided by them. By establishing that arbitration can be compelled under the FAA only if it "effectively" enables each party to vindicate its statutory rights, *Mitsubishi*,

473 U.S. at 637, and not if one party "will for all practical purposes be deprived of his day in court," *id.* at 632 (citation and internal quotation omitted), this Court has made plain that Congress did not intend to invade the Constitutional right to access justice by enacting the FAA but, rather, intended only to promote an alternative means of accessing justice. By ensuring that arbitration clauses will be enforced only if they in practice provide a genuinely available alternative forum for vindicating statutory rights, this Court has ensured that each citizen's right to access justice is preserved under the statute.

Petitioners and some of their *amici* erroneously deride as *dicta* this Court's repeated statements about the need to ensure effective vindication of statutory rights in the arbitral forum. Even if they were *dicta*, however, they were very compelling *dicta* because they echoed the need to preserve the fundamental Constitutional right to access justice that Congress would not lightly toss away. *See BE&K Constr.*, 536 U.S. at 525.

Petitioners ask this Court to find, for the first time, that when it enacted the FAA Congress did, in fact, enable private parties to toss aside the right to access justice for claimants who cannot rationally pursue arbitration. But there is no evidence in the FAA's text or legislative history that the 1925 Congress, by promoting an alternative forum, intended to enable one private contracting party to use arbitration agreements to deprive another contracting party of any forum altogether. Nor is there evidence that Congress even contemplated the possibility that arbitration clauses could be used in

practice to deny aggrieved parties of access to justice, or of their right to enforce their federal statutory rights. Certainly, Congress would not sacrifice access to justice on the altar of the FAA when doing so would not advance the FAA's pro-arbitration purpose.

To be sure, claimants can be forced to abandon their claims and be denied a remedy for meritorious claims if a class action lawsuit filed on their behalf is not certified or becomes decertified. But in that context the deprivation of justice is Constitutionally compelled by the defendant's right to due process. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23 protections are "grounded in due process"). Denial of access to justice in that context is appropriate because the Fourteenth Amendment right to petition the courts is necessarily delimited by the Due Process clause. A statute, however, should not be construed as enabling private parties to deprive others of access to justice absent a clear intent by Congress to do so. *BE&K Constr.*, 536 U.S. at 525. That intent is absent here.[3]

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[3] While private arbitration contracts do not involve state action, the statutory interpretation question in this case does implicate state action: whether Congress intended the FAA to be interpreted by a court as enabling a powerful contracting party to use an arbitration clause to prospectively deprive other citizens of their right to access justice. Any statute that can be construed as limiting a Constitutional right is subject to challenge, and if it is "reasonably susceptible of two interpretations" it is this Court's "plain duty to adopt that construction which will save the statute from constitutional infirmity." *U.S. ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (citation omitted). The FAA is

C. Compelling small business owners and other claimants to arbitrate when they cannot rationally do so would also undermine Congress's private antitrust enforcement objectives under the Sherman and Clayton Acts. This Court has long recognized that citizens' suits against antitrust violators serve a vital public purpose and work to deter wrongdoing that understaffed and underfunded governmental agencies lack resources to pursue. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Private attorneys general bringing suit are a "chief tool" and play a "central role" in Congress's enforcement scheme. *Mitsubishi*, 473 U.S. at 635 (citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-39 (1968), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)).

While citizens who can "effectively" vindicate antitrust claims in arbitration can serve that role equally as well in arbitration as in court, *id.* at 637, citizens who cannot rationally arbitrate, and who therefore will have to abandon their claims if compelled to arbitrate, cannot. If such antitrust claimants are nevertheless forced to arbitrate, drafters of arbitration clauses will increasingly draft provisions that make individual antitrust arbitration less viable, *see infra* Point III, and the result will be a gaping hole in Congress's intended private antitrust enforcement mechanism.

"amenable to a limiting construction," *Skilling v. United States*, 130 S. Ct. 2896, 2929-30 (2010), that avoids it being interpreted as depriving litigants of access to justice; namely, the construction that was applied in this Court's vindication of rights precedents and in *Amex*.

There is no evidence in the FAA's text or legislative history that the 1925 Congress intended to undermine the intent of the 1890 and 1914 Congresses that passed and reenacted the treble damages provisions of the Sherman and Clayton Acts. *See id.* at 636 (treble damages remedy promulgated in 1890 and reenacted in 1914). Certainly, there is no indication that the 1925 Congress intended to repeal an integral component of the antitrust laws when doing so would not even advance the FAA's pro-arbitration purpose.[4]

D. Respondents have shown that Petitioners' supposition that upholding *Amex* could lead to "floods" of claimants avoiding arbitration and filing class actions is untrue. *See* Brief for Respondents at 28-32. But given that blindly forcing arbitration on

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[4] An agreement that expressly attempts to confer even "partial immunity from civil liability" for future antitrust violations is unenforceable. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). A contract that contains a *de facto* or disguised prospective antitrust immunity clause is even more insidious because it fails to give the counter-contracting party any express notice that its right to sue for antitrust violations is purportedly being waived. Under *Lawlor*, Petitioners could not legally enforce a provision in their credit card agreements stating that Petitioners are "immune from civil antitrust liability," and they likewise could not enforce an arbitration clause stating they are "immune from civil antitrust liability if you cannot afford to arbitrate," because that would constitute conferring "partial immunity" upon themselves for future antitrust violations. *A fortiori*, Petitioners cannot enforce an arbitration clause that is silent as to prospective antitrust immunity but which as a practical matter has the same effect. If Petitioners cannot overtly immunize themselves from future antitrust liability, they also cannot do so *sub silentio*.

litigants who cannot pursue it will both impinge on their Constitutional right to access justice and undermine Congress's antitrust enforcement scheme without genuinely advancing the FAA's objectives, the short answer to Petitioner's claim – even if it were true – should properly range from "it's the lesser of two evils" to "so what?" Class actions and viable arbitral proceedings have coexisted for decades as alternative means of enforcing statutory rights, and there is no reason they cannot continue to coexist. The FAA is not an anti-class action statute, nor is it a statute designed to permit defendants to cloak themselves with *de facto* antitrust or other statutory immunity, and this Court's decision in *Concepcion* did not (and could not) convert the FAA into something it is not. *See infra* Point II. The object of the FAA is to compel arbitration so long as the arbitral forum provides a genuine alternative to a court proceeding for the individual claimant. The FAA's purpose is not to compel arbitrations that will never actually take place and, thereby, deny citizens of access to justice altogether while enabling statutory violators to avoid civil liability.

The Second Circuit's *Amex* decision holding that claimants cannot be compelled to arbitrate if they prove they cannot rationally pursue individual arbitration harmonizes Congress's intent to promote arbitration with every citizen's fundamental right to access justice and Congress's private antitrust enforcement scheme. The court's decision did not reflect a "judicial hostility to arbitration" – the evil Congress sought to remedy through the FAA. *Concepcion*, 131 S. Ct. at 1745 (citation omitted). It

was instead based on the need to preserve and enforce the right of small claimants to bring antitrust claims, an accurate assessment of Congress's intent under both the FAA and the antitrust laws, and this Court's vindication of rights precedents and long-standing prohibition against contractual grants of partial antitrust immunity. The Second Circuit's decision should be affirmed.

II. As a Matter of Jurisprudence, *Concepcion* Did Not Limit or Overrule This Court's Vindication of Rights Precedents, and, In Fact, *Concepcion* is Perfectly Compatible with those Decisions.

A. This Court's *Concepcion* decision neither addressed nor implicated the vindication of statutory rights concept because it involved individual plaintiffs whom the courts at every level agreed *could* vindicate their rights in arbitration. *See Concepcion*, 131 S. Ct. at 1750, 1753 (Ninth Circuit found recovery for named plaintiffs through individual arbitration was "'essentially guaranteed,'" and District Court stated named plaintiffs were "better off" in arbitration than in a class action) (citations omitted). Consequently, the "Question Presented" in the *Concepcion* Certiorari Petition expressly carved out the vindication of rights issue: "Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." Petition for a Writ of

Certiorari, *AT&T Mobility LLC v. Concepcion*, No. 09-893, 2010 U.S. S. Ct. Briefs LEXIS 535, at *1 (Jan. 25, 2010).

The Petition's focus was that California's *Discover Bank* rule was an overly broad one holding that "agreements to arbitrate on an individual basis are unenforceable in the consumer context – even when the arbitration provision ensures that the consumer is able to vindicate his or her claims on an individual basis." *Id.* at *10. The Court then framed both the issue presented and its holding in terms of the *Discover Bank* rule. *See Concepcion*, 131 S. Ct. at 1746 ("The question in this case is whether [FAA] § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."); *id.* at 1753 ("California's *Discover Bank* rule is preempted by the FAA.").

Thus, the vindication of rights principle that *Amex* addresses was unequivocally not at issue in *Concepcion*. Given *Concepcion's* factual and legal context, it is therefore unsurprising that neither the vindication of rights principle nor *Randolph* is mentioned in either the majority or dissenting opinions. Because *Concepcion* involved plaintiffs who could vindicate their statutory rights in arbitration, and the Court's holding did not reach beyond the confines of the specific *Discover Bank* rule preemption question presented, as a matter of jurisprudence the decision's *stare decisis* effect reaches no further. *See, e.g., Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979) (*stare decisis* holds that "[a] judicial precedent attaches a specific legal consequence to a detailed set of facts"

and "furnish[es] the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court") (citation omitted).

Any contention that *Concepcion* is binding precedent that controls the present appeal is thus incorrect.

B. Petitioners' argument that *Concepcion* is incompatible with this Court's vindication of statutory rights precedents, and therefore foretells their demise, also does not withstand analysis. Petitioners' argument rests on four flawed assumptions drawn from two sentences in the penultimate paragraph of the *Concepcion* majority opinion where, in response to the dissent's claim that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Court stated that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753 (internal citation omitted). Petitioners' flawed assumptions are:

> (1) Petitioners assume that the Court's references to "class proceedings" and "a procedure" meant class actions as well as class arbitrations.
>
> (2) Petitioners assume that a class action "procedure" is necessarily "inconsistent with the FAA."

(3) Petitioners assume that the phrase "desirable for unrelated reasons" included the desire to vindicate statutory rights.

(4) Petitioners assume the "small-dollar" claimants whose claims could "slip through the legal system" referred to the individual named plaintiffs in *Concepcion* rather than the absent members of the putative class.

Having made these four assumptions, Petitioners conclude that the Court's two sentence statement equates to a ruling that federal courts cannot permit any named plaintiff to maintain a class action in the face of any type of arbitration clause, even if the named plaintiff will be unable to vindicate its rights because it cannot rationally pursue arbitration. That conclusion is as invalid as the four assumptions on which it rests.

As to the first two assumptions, the *Concepcion* opinion, read as a whole, does not support the interpretation that "class procedures" included class actions as well as class arbitrations. In *Concepcion*, the Court found exclusively that class arbitration was "inconsistent with the FAA"; it did not say that all class procedures were. *See id.* at 1748 ("Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *id.* at 1750-51 ("The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").

The Court's analysis, moreover, which emphasized the risks non-consensual class arbitration would pose to defendants, drew favorable comparisons in that regard to class actions. The Court stated that due to the lack of "effective means of review" under 9 U.S.C. § 10, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Id.* at 1752. "In litigation," however, "a defendant may appeal" both "a certification decision" and "a final judgment" to a higher tribunal, where "[q]uestions of law are reviewed *de novo* and questions of fact for clear error." *Id.* The lack of sufficient formal procedures in class arbitration, furthermore, would create a risk that "absent class members would not be bound by the arbitration"; indeed, it is "odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied." *Id.* at 1751-52. Rule 23 procedures and judicial oversight minimize these risks in class actions.

Because the Court views class arbitration as more risky for defendants than class actions, it is unlikely that the Court would weigh class actions and class arbitrations equally when assessing their compatibility with the FAA, as Petitioners assume. For example, if the Court agrees with the Second Circuit that small business owners who cannot rationally arbitrate individually should not be compelled to do so, it seems clear from *Concepcion* that the Court would find the defendants better served if the parties' dispute was resolved in a class action than by class arbitration. Hence, in the context of the present case at least, where the objectives of both the FAA and the antitrust laws

must be balanced, class actions are less "inconsistent with the FAA" than class arbitration. Petitioners' assumption that the Court's use of the phrase "class proceedings" was meant to include class actions, therefore, is unwarranted.

Should this Court reaffirm its vindication of rights precedents and continue to enforce only arbitration clauses that do not work to deprive citizens of access to justice, the Court's preferred alternative surely would be to permit the plaintiff to maintain a class action rather than to compel the defendants to endure the risks of class arbitration.

As to Petitioners' second two assumptions, the vindication of rights principle was not at issue in *Concepcion*. *See supra* at 15-17. So, facially, there is no basis for Petitioners' interpretation that this Court, by stating that States could not compel class "procedures" even if "desirable for unrelated reasons," meant that class actions are prohibited even when they are essential to vindicate the individual named plaintiffs' statutory rights.

But Petitioners' interpretation also reflects a misunderstanding of the majority's debate with the dissent which led to the two sentences on which Petitioners rely. Because the Court accepted the lower courts' findings that the Concepcions "were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action," *Concepcion*, 131 S. Ct. at 1753 (emphasis in original), that debate could not have been about the vindication of the named plaintiffs' *own* individual rights. Rather, the more plausible

reading is that the debate was about whether California could void AT&T's arbitration clause simply because it prevented the named plaintiffs from vindicating the rights of absent class members.

The district court's opinion in *Concepcion* is revealing on this point, as it initially framed the debate in precisely those terms. *See Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 U.S. Dist. LEXIS 103712, at *32-44 (S.D. Cal. Aug. 11, 2008). The district court found that AT&T's arbitration procedures were sufficiently consumer-friendly to enable claimants to obtain full redress through individual arbitration. *Id.* at *32-37. The court nevertheless held that, under *Discover Bank*, AT&T's arbitration provision was unconscionable because it enabled AT&T to "avoid potential liability to thousands of other customers who have no knowledge of the alleged wrongdoing," and thus, would not "'serve[] as a disincentive'" for AT&T to avoid that type of wrongdoing in the first place. *Id.* at *41-42 (quoting *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 159, 30 Cal. Rptr. 3d 76, 84, 113 P.3d 1100, 1108 (2005)); *see also Discover Bank*, 36 Cal. 4th at 156-57, 30 Cal. Rptr. 3d at 81-82, 113 P.3d at 1105-06 (discussing deterrence policy of class actions).

The underlying FAA policy debate that percolated up to the Court in *Concepcion*, therefore, was whether the California courts' desire to vindicate absent class members' rights and deter wrongdoing through class procedures were permissible reasons for voiding an arbitration clause under the FAA, even though AT&T's arbitration

clause enabled individual claimants to vindicate their own rights in arbitration. This elucidates the Court's statement that States cannot require class procedures "even if it is desirable for unrelated reasons" – the "unrelated reasons" referred to protecting the absent class members who had not sued and deterring future wrongdoing by AT&T. The "small-dollar claims that might otherwise slip through the legal system," likewise, were not the claims of the named plaintiffs, but those of absent class members who did not know they had claims.

If *Concepcion* is read correctly within the context of the case's background, it becomes apparent that this Court did not implicitly overrule *Mitsubishi*, *Randolph*, and *Pyett* and hold that it would now permit an arbitration agreement to serve in practice as a prospective waiver of a claimant's statutory rights. Rather, the Court simply concluded that when individual claimants can be made whole in arbitration, their procedural right to serve as class representatives to protect absent class members and deter wrongdoing cannot trump the defendant's right to arbitrate under the FAA. Because the right to arbitrate is a substantive statutory right and the named plaintiffs' option to bring a class action is a procedural right only, *see Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), the substantive statutory right necessarily controls, and the procedural right must give way.

Some courts have correctly read *Concepcion* in this manner.[5] Petitioners and their *amici* have not.

C. In sum, Petitioners' argument that this Court's vindication of rights precedents cannot stand in light of *Concepcion* is built on a series of false assumptions and a fundamental misreading of the case. Read correctly, *Concepcion* is entirely consistent with, and easily reconciled with, *Mitsubishi, Randolph* and *Pyett*. *Concepcion* did not hold or imply that arbitration provisions should be blindly enforced even if the named plaintiffs cannot vindicate their individual rights in the arbitral forum. It held that when the individual claimants *can* be made whole in arbitration – that is, *when* they can fully vindicate their "statutory rights in the arbitral forum," *Randolph*, 531 U.S. at 90 – the FAA's pro-arbitration policy outweighs the ancillary

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[5] *See Sutherland v. Ernst & Young LLP*, 847 F. Supp 2d 528, 537 (S.D.N.Y. 2012):

> There is a difference ... between claims that might slip through the cracks because plaintiffs choose not to prosecute them individually, and claims for which a plaintiff seeks redress but is precluded from vindicating her rights. ... [T]he Concepcions could bring their claim in arbitration on an individual basis .... The fact that a plaintiff in the same situation as the Concepcions might choose not to make a claim for such a small overcharge is not the Court's concern.

See also Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (LBS) (JCF), 2011 U.S. Dist. LEXIS 73200, at *10-11 (S.D.N.Y. July 7, 2011) (*Concepcion*'s discussion was analogous to pitting the FAA against "the plaintiff's desire to proceed as class representative under Rule 23," which does not create "a federal statutory right to proceed on a class basis") (citation omitted).

procedural policies underlying a class representative's function.

The Second Circuit correctly applied all of this Court's arbitration precedents in *Amex*, and its decision should be affirmed.

III. Upholding *Amex* Would Advance the FAA's Objectives, While, Contrary to Petitioners' Policy-Based Arguments, Reversing *Amex* Would Undermine the FAA's Objectives.

A. *Amex* was a pro-arbitration decision. The Second Circuit's holding that arbitration clauses should not be enforced if one of the contracting parties proves it cannot rationally pursue arbitration will encourage those who are genuinely interested in the benefits of arbitration to draft arbitration clauses that ensure claimants will be able to effectively vindicate their statutory rights in arbitration. If *Amex* is affirmed, and Petitioners genuinely want to arbitrate future antitrust claims individually rather than to use arbitration clauses as a shield against civil liability, Petitioners will be encouraged to draft new arbitration clauses ensuring that their counter-contracting parties can pursue claims in arbitration. All drafters of arbitration clauses will be similarly encouraged, resulting in more consumer-friendly arbitration agreements, fewer claimants who cannot rationally seek to vindicate their rights in arbitration, and, consequently, the increased use of arbitration as a genuine dispute resolution vehicle.

Reversing *Amex* will have the opposite effect. Holding that arbitration clauses must be blindly enforced even if it leads to no arbitration taking place at all will lead to increasingly unfriendly arbitration provisions and ever-fewer arbitrations. Why, for example, would AT&T continue to pay double attorneys' fees and other costs to successful claimants in arbitration, *see Concepcion*, 131 S. Ct. at 1744 (describing AT&T's arbitration clause), if the law permitted AT&T to compel arbitration even under an arbitration clause that lacks those features?

If powerful contracting parties are able to use arbitration agreements to effectively obtain *de facto* immunity for statutory violations, their fiduciary drive to maximize profit will necessarily yield a calculus that their bottom lines would benefit best by arbitration provisions that foreclose arbitration to as many prospective claimants as possible, not by arbitration agreements that facilitate arbitration.

If the law compels arbitration even by citizens who cannot rationally arbitrate, arbitration clauses that as a practical matter deprive many prospective claimants of the ability to arbitrate will become ubiquitous, and consumer-friendly clauses will fade from existence. The inevitable result will be less arbitration, less access to justice for aggrieved small business owners and other claimants, reduced civil accountability for antitrust and other statutory violators, and a corresponding increase in those species of unlawfulness. It is difficult to imagine

how that result could serve the FAA's objectives, or any other Congressional purpose.[6]

Judge Pooler, the author of the *Amex* opinions, correctly noted when the Second Circuit denied *en banc* review that to blindly compel arbitration by litigants who cannot rationally pursue it would "clos[e] the courthouse door to all but the most well-funded plaintiffs" in federal statutory rights cases. *In re American Express Merchants' Litig.*, 681 F.3d 139, 142 (2d Cir. 2012) ("*Amex en banc*"). Under the First Amendment, the privilege of enforcing statutory rights is not reserved to powerful entities,

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[6] Some of Petitioners' *amici* mistakenly refer to the need to ensure access to justice as a "policy consideration" rather than a Constitutional one. *See* Brief of the Chamber of Commerce of the United Sates of America and Business Roundtable as *Amici Curiae* In Support of Petitioners, at 26. Based on a few anecdotes, they suggest that a "business model" will evolve to coordinate some individual arbitrations through cost-sharing arrangements. *Id.* at 29-30. But even if such an approach may be economically rational for some claimants in some cases, these *amici* offer no evidence that the practice has successfully vindicated a single claimant's rights to date, much less that *amici's* speculations about its future use someday satisfies the Constitution's mandate that all citizens have access to justice today. The history of arbitration clause litigation has shown, moreover, that if blindly enforcing arbitration clauses "as written" becomes the law of the land, drafters of arbitration provisions will soon attempt with a stroke of a pen to preclude claimants from pooling resources, just as they have barred them from pursuing collective actions and public injunctions.

These *amici* recognize that this case, at least in part, is about "access to justice," *id.*, at 30, 31, but they ignore the economic reality that the fiduciary profit motive will impel entities like Petitioners to draft arbitration clauses that minimize access to justice if the law permits them to do so.

the well-to-do, and the economically irrational. The privilege to access justice belongs to every other citizen as well.

B. Respectfully, Chief Judge Jacobs' policy-laden arguments for reversing *Amex* do not advance the objectives of the FAA, certainly not sufficiently to conclude that Congress intended to foreclose access to justice to those who cannot rationally pursue arbitration. The contention that *Amex* may be used by "class action lawyers" to oppose arbitration in any case involving small damages, *id.*, at 143, (Jacobs, C.J., dissenting), appears to assume that the FAA is an anti-class action statute – it is not. The FAA is designed to promote arbitration, and as shown above, affirming *Amex* will promote arbitration while reversing it would undermine both arbitration and the Constitutional right of citizens to access justice by other means. As a procedural matter, the argument ignores that any plaintiff's effort to resist arbitration on vindication of rights grounds "must be considered on its own merits, based on its own record," *Amex*, 667 F.3d at 219, subject to a summary judgment standard, *Sutherland*, 768 F. Supp. at 549. An entitlement to summary judgment is an analysis courts regularly perform, and which they "are perfectly capable of doing ... to determine if the plaintiffs have made the necessary showing" under the Second Circuit's decision. *Amex en banc*, 681 F.3d at 142 (Pooler, J., concurring).

Chief Judge Jacobs' belief that vindication of rights litigation will turn motions to compel arbitration into "searching" merits inquiries

involving *Daubert* challenges and class certification questions, *id.*, at 144-45 (Jacobs, C. J., dissenting), is not fully explained, and it overlooks the records in *Amex* and the other vindication of rights cases, where no such thing occurred. *Amex* requires only a relatively simple cost-effectiveness analysis of whether an economically rational individual plaintiff can vindicate its rights under the statute sued upon, and if the defendant submits probative evidence that the plaintiff actually can be made whole under the terms of the arbitration clause at issue, the plaintiff will not meet its summary judgment burden.

Chief Judge Jacobs' contention that *Amex* equates being "made whole" with a "complete victory" that is "rarely achieved," *id.*, at 144, misses the critical point of the vindication of rights requirement. It is not whether a plaintiff *will* win a "complete" victory that matters, but whether the plaintiff conceivably *can* win such a victory if it pursues its remedies to the fullest. The Second Circuit found as a matter of law that the *Amex* plaintiffs cannot win *any* recovery in arbitration because they will be forced to abandon their claims, but that they can potentially win a full recovery in a class action if it is tried to conclusion. Hence, the First Amendment and the FAA dictate that those plaintiffs not be compelled to arbitrate.

Finally, while Chief Judge Jacobs recognizes that the "'overarching purpose of the FAA'" is to enforce arbitration clauses "'so as to facilitate streamlined proceedings,'" *id.*, at 145 (quoting *Concepcion*, 131 S. Ct. at 1748), he does not explain how ordering a plaintiff to file an economically

irrational arbitration that will never take place advances the FAA's purpose. If the FAA is designed to promote arbitration, the statute cannot be interpreted as intending a scheme that leads to no arbitration. "In other words, the act cannot be held to destroy itself." *Concepcion*, 113 S. Ct. at 1748.

CONCLUSION

For the foregoing reasons, the Court should affirm the Second Circuit's decision.

Respectfully submitted.

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JANUARY 29, 2013

AMICUS CURIAE BRIEF

No. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *ET AL.*,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public. The fairness of mandatory arbitration agreements has long been a significant concern of Public Citizen, and Public Citizen attorneys have represented parties or filed amicus curiae briefs in many of this Court's cases addressing arbitration, including *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Public Citizen is particularly concerned to ensure that enforcement of arbitration agreements in accordance with this Court's decisions does not undermine the substantive rights of litigants, and that concern lies at the heart of this case.

SUMMARY OF ARGUMENT

Can an arbitration agreement be enforced when plaintiffs who have federal antitrust claims that could viably be pursued in court prove that it will be impossible for them to present those claims in individual arbitration under the agreement? That is the question posed by this case. If this Court means what it has re-

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that this brief was not written in whole or in part by counsel for a party and that no one other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

peatedly said in its decisions under the Federal Arbitration Act (FAA)—that arbitration agreements are enforceable if they permit the effective vindication of statutory rights—then the answer to that question must be no.

The Second Circuit's decision declining to enforce the arbitration agreement at issue in this case is firmly grounded in a principle incorporated in the text and judicial construction of the FAA: Arbitration agreements are choices of forum that do not strip parties of otherwise nonwaivable rights. The FAA provides that agreements to resolve claims through arbitration are enforceable to the same extent as other contracts. 9 U.S.C. § 2. Nothing in the FAA, however, says that agreements to *waive* claims are enforceable. After all, such agreements are the opposite of agreements to arbitrate: They are agreements not to arbitrate (or litigate) at all. Thus, this Court, beginning in its seminal opinion *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985), has said over and over again that an arbitration agreement, to be enforceable, must preserve plaintiffs' substantive rights under federal statutes.

Moreover, the Court has repeatedly stated that an agreement that does not expressly waive a substantive claim but imposes conditions that effectively make it impossible for a plaintiff to assert that claim is as improper as an agreement that purports to nullify statutory rights expressly. That is, arbitration must permit "effective vindication" of statutory rights. *Id.* at 637. Thus, this Court has recognized that arbitration clauses imposing onerous fees that would make it impossible to assert federal statutory claims would be unenforceable. *See Green Tree Fin. Corp.-Alabama v.*

Randolph, 531 U.S. 79 (2000). Such agreements fall outside the FAA because they are not agreements to resolve disputes by arbitration, but agreements to prevent the resolution of disputes by any means.

For this reason, the FAA does not conflict with, but in fact reinforces, other legal doctrines that preclude enforcement of waivers of substantive rights. In this case, for example, enforcing a waiver of respondents' entitlement to challenge American Express's allegedly unlawful tying arrangement under the antitrust laws would violate the public policies incorporated in those laws. That result would also run squarely against this Court's repeated insistence that arbitration clauses must permit effective vindication of statutory rights.

Moreover, enforcing an arbitration agreement that prevents the vindication of substantive rights is by no means compelled by the result in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, where the question decided by the Court was whether a class action ban in an arbitration clause is enforceable when a class action is *not* necessary to vindicate the plaintiff's rights. Nothing in *Concepcion* requires displacement of doctrines that ensure that arbitration agreements preserve substantive rights.

In the face of respondents' demonstration that the arbitration agreement does not permit effective vindication of their rights, American Express invokes what it perceives as the benefits that arbitration may offer claimants in other types of cases—in particular, employment and consumer cases. But whatever the merits of American Express's controversial assertions that arbitration benefits litigants generally, those assertions do nothing to answer the evidence showing

that requiring arbitration on the facts of this case would amount to enforcing an invalid waiver of substantive rights. Declining to enforce an arbitration agreement in the narrow circumstances where plaintiffs demonstrate that it would deprive them of their substantive claims will not detract from any benefits that arbitration may offer in other cases.

This Court has never held that an arbitration agreement can be enforced when its procedures demonstrably make it impossible to assert a nonwaivable federal statutory claim. A holding that an arbitration clause banning class actions is unenforceable when plaintiffs prove that it prevents vindication of their rights will not undermine the FAA's goals—to make arbitration available as a means of resolving disputes. It will fulfill those goals by permitting arbitration only when it in fact serves its function of allowing the resolution of disputes. Barring assertion of substantive claims in the guise of requiring them to be arbitrated is no part of the FAA's purpose.

ARGUMENT

I. The FAA, by Its Own Terms, Does Not Authorize Waiver of Substantive Rights.

The plain language of the FAA makes agreements to *arbitrate* claims enforceable, not agreements to *waive* claims. Section 2 of the FAA provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to *settle by arbitration a controversy* thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ..., shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). As its language indicates, the FAA

requires enforcement of agreements to *resolve disputes* by arbitration, not agreements that *foreclose* assertion and resolution of claims.

Consistent with this language, this Court has characterized the FAA as authorizing a *choice of forum* for resolving disputes, not as a mechanism for preventing assertion of claims. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), for example, the Court, in enforcing an agreement to arbitrate federal securities claims, described arbitration agreements as "a specialized kind of forum-selection clause." *Id.* at 519. The Court has repeated its characterization of arbitration agreements under the FAA as "forum-selection" or "choice-of-forum" clauses regularly in the decades since *Scherk*. *See, e.g.*, *CompuCredit*, 132 S. Ct. at 671 (2012); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 & n.10 (2002); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 483 (1989); *Mitsubishi*, 473 U.S. at 629-31.

A forum-selection clause determines *where* a claim will be decided, not *whether* it may be pursued. Thus, this Court has emphasized that under the FAA an arbitration agreement "*only* determines the choice of forum." *Waffle House*, 534 U.S. at 295 n.10 (emphasis added). As the Court explained in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. The Court has repeated these words from *Mitsubishi* no

fewer than seven times in subsequent cases. *Pyett*, 556 U.S. at 266; *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Waffle House*, 534 U.S. at 295 n.10; *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

Not only does the FAA not *require* enforcement of agreements that deprive parties of substantive rights in the guise of arbitration; it *prohibits* their enforcement. *Mitsubishi* stated that if an arbitration agreement "operated ... as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19; *accord Vimar Seguros*, 515 U.S. at 540. Thus, *Mitsubishi* announced that the FAA requires arbitration of claims only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum ...." 437 U.S. at 637. Again, the Court has reiterated these words in subsequent decisions. *See Green Tree*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 28; *McMahon*, 482 U.S. at 240.

The principle that an arbitration agreement must permit effective vindication of substantive rights is no mere invention by the Court: It flows directly from the language of FAA section 2, which makes agreements to settle controversies by arbitration enforceable. An agreement that *precludes* arbitration of a particular type of claim is not an agreement to settle a dispute by arbitration. The FAA authorizes parties to determine the forum for resolving claims; it is not a source of authority for agreements waiving claims.

Moreover, the effective-vindication principle forbids not only direct waivers of rights but also agreements imposing procedural impediments preventing effective vindication of rights. Thus, an arbitration agreement, like other forum-selection provisions, is unenforceable if "proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.'" *Mitsubishi*, 473 U.S. at 632 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). The Court recognized this consequence in *Green Tree*, where it considered a plaintiff's claim that excessive arbitration fees prevented her from vindicating rights under the Truth in Lending Act. Quoting *Mitsubishi*, *Green Tree* reiterated that an arbitration agreement must permit effective vindication of statutory rights, 531 U.S. at 90, and acknowledged that excessive costs could prevent a party from effectively vindicating rights "in the arbitral forum." *Id.* The Court held that the plaintiff in *Green Tree* had not demonstrated prohibitive costs, but that actual proof of such costs *would* invalidate an arbitration agreement. *Id.* at 92.

II. The FAA Does Not Override Other Laws Creating Substantive Rights That Are Not Subject to Waiver.

Because an arbitration clause imposing terms requiring a party to forgo substantive rights or preventing effective vindication of rights exceeds what the FAA requires courts to enforce, the FAA does not conflict with or displace other sources of law that make particular substantive claims nonwaivable. Rather, such laws are fully consistent with the FAA and, indeed, implement the FAA's own policy.

Put another way, the *Mitsubishi* non-waiver principle and its corollary that arbitration agreements must permit effective vindication of rights is "part of the body of federal substantive law of arbitration," *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006), and, therefore, corresponding legal doctrines prohibiting waiver of claims do not conflict with the FAA. Any suggestion that it would violate the FAA to apply *Mitsubishi's* non-waiver principle to the claims at issue here "confuse[s] an agreement to arbitrate"—which is protected by the FAA—"with a prospective waiver of the statutory right"—which the FAA does not authorize. *Pyett*, 566 U.S. at 265.

Because this case concerns only whether the effective-vindication principle applies to claims under federal law, the Court need not address its potential application to state-law claims, an issue that has not received adversary briefing in this case. *See* Resp. Br. 50. We note, however, that because the FAA does not authorize agreements waiving claims, as opposed to agreements to arbitrate them, the FAA does not conflict with, and hence should not preempt, state laws that prevent enforcement of agreements that effectively waive state-law claims. Thus, both this Court and other federal courts have recognized the applicability of *Mitsubishi*'s non-waiver principle to state-law rights.[2]

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[2] *See Preston v. Ferrer*, 552 U.S. at 359 (stating, in a case involving claims under California law, that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum" and that a party to an arbitration agreement "relinquishes no substantive rights ... California law may accord him"); *see also Circuit City*, 532 U.S. at 123 (quoting

(*Footnote continued*)

Of course, this Court has held that the FAA displaces *conflicting* state law under the Supremacy Clause. *Vaden v. Discover Bank*, 556 U.S. 49, 58-59 (2009); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-272 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Only Congress can *override* the FAA by legislation making it inapplicable to claims otherwise within its scope. *See CompuCredit*, 132 S. Ct. at 669. But state laws precluding enforcement of agreements that prevent effective vindication of substantive rights are fully consistent with the FAA.

However that question may be resolved, there is no dispute that, as a matter of *federal* antitrust law, the substantive claims at issue here may not be waived by the very agreements containing the allegedly unlawful tying provisions. Indeed, American Express itself does not contend that the antitrust laws would permit a company whose contracts contained an unlawful tying provision to insulate that provision from challenge by adding another provision waiving any claim that the contract violated the antitrust laws.

In *Mitsubishi*, this Court recognized that an agreement purporting to waive substantive rights under the antitrust laws would be unenforceable. 473

Mitsubishi's statement that parties to arbitration do not forgo substantive rights in a case involving state-law claims); *Kristian*, 446 F.3d at 29 (holding that arbitration provisions are unenforceable if they "prevent the vindication of statutory rights under *state* and federal law") (emphasis added); *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (holding that an arbitration agreement may not require a party to "forgo substantive rights" under local law of the District of Columbia) (Roberts, J.).

U.S. at 637 & n.19. Indeed, it would defeat the purpose of the antitrust laws—to protect consumers and competitors against the exploitation of market power—if a company could use the very market power the antitrust laws are aimed at to require its customers to agree to waive the protection of those laws. *See, e.g., Radio Corp. of Am. v. Raytheon Mfg. Co.*, 296 U.S. 459, 462 (1935) (stating that a purported release of antitrust claims is unenforceable "when it is so much a part of an illegal transaction as to be void in its inception"); *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 100-01 (5th Cir. 1974) (holding that a release is invalid if "the release itself was an integral part of a scheme to violate the antitrust laws").

In other words, American Express may not exploit market power to require merchants not only to take its credit cards, but also to waive any antitrust tying claims, as the price of accepting its charge cards. But enforcing the arbitration clause in the circumstances of this case would allow American Express to do just that. Nothing in the FAA allows American Express to obtain indirectly what it cannot obtain directly—immunity against antitrust treble damages actions—merely by requiring its customers to agree to arbitration proceedings that make antitrust claims impossible when they agree to the allegedly illegal tying arrangement.

This conclusion is reinforced by the "savings clause" of FAA section 2, which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has recognized that one such longstanding ground for not enforcing a contract is the public policy against waivers

of statutorily protected rights. *Mitsubishi*, 473 U.S. at 637 n.19; *accord Vimar Seguros*, 515 U.S. at 540; *see also United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (describing the "general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy").

This contract-law principle falls within the FAA's savings clause because it applies equally to arbitration agreements and other contracts: It does not "take its meaning precisely from the fact that a contract to arbitrate is at issue," but is a "generally applicable contract defense[]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685, 687 (1996). Nor does it "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion,* 131 S. Ct. at 1748. Rather, the non-waiver principle prevents arbitration only in the limited set of cases where arbitrating would amount to a waiver of substantive rights, and the FAA's objectives do *not* include requiring a party to relinquish any "substantive right ... [the] law may afford him." *Preston v. Ferrer*, 552 U.S. at 359.

III. *Concepcion* Did Not Overrule the Longstanding Principles Underlying the Decision Below.

Concepcion does not require this Court to reconsider its repeated recognition that the FAA does not authorize agreements waiving substantive rights. *Concepcion* leaves unaltered the Court's repeated holdings that the FAA neither requires nor allows enforcement of arbitration agreements waiving substantive statutory rights or preventing effective vindication of rights—holdings that necessarily mean the FAA does not conflict with other federal laws serving

exactly those same interests. Moreover, the reasons for *Concepcion*'s abrogation of the California Supreme Court ruling in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), are inapplicable here.

Concepcion held that the FAA preempted the *Discover Bank* rule because that rule "interferes with arbitration." 131 S. Ct. at 1750. In *Discover Bank*, the California Supreme Court held that a class-action ban was unconscionable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. *Concepcion* concluded that *Discover Bank* "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable," 131 S. Ct. at 1746, because its "malleable and toothless" requirements had "no limiting effect," as virtually all consumer contracts are adhesion contracts, most consumer disputes involve relatively small sums, and merely alleging a scheme affecting many consumers sufficed to invoke the rule. *Id.* at 1750. *Discover Bank* thus "allow[ed] any party to a consumer arbitration to demand [classwide arbitration] *ex post*" as a condition on enforcement of an arbitration agreement. *Id.* By allowing consumers in most cases to avoid arbitration altogether unless classwide arbitration were offered, *Discover Bank* "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 1748.

Nothing in *Concepcion*, however, validated arbitration clauses that purport to waive otherwise nonwaivable statutory rights. The Court did not question its many decisions from *Mitsubishi* onward holding that arbitration agreements are not waivers of substantive claims and must permit effective vindication of rights. Nor did the Court cite, let alone overturn, *Green Tree's* recognition that proof that an arbitration agreement prevents vindication of a party's rights would avoid its enforcement under the FAA.

Indeed, the question presented in *Concepcion* made clear that the validity of arbitration clauses that prevent vindication of rights was not before the Court:

> Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—*when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.*

http://www.supremecourt.gov/qp/09-00893qp.pdf (emphasis added).

Consistent with the question presented, *Concepcion* emphasized that under AT&T's arbitration agreement, the plaintiffs' claim "was most unlikely to go unresolved" because the agreement contained provisions that "provide[d] incentive for the individual prosecution of meritorious claims that are not immediately settled" and "essentially guarantee[d]" the plaintiffs would be "made whole." 131 S. Ct. at 1753. Indeed, the Court concluded that the plaintiffs actually "were better off under their arbitration agreement

... than they would have been as participants in a class action." *Id.*

Concepcion thus did not address whether an arbitration clause is enforceable when its ban on class proceedings and its lack of other provisions for cost-sharing or cost-shifting demonstrably *prevent* vindication of nonwaivable statutory rights. Rather, *Concepcion* held that the FAA preempts a rule prohibiting class-action bans where individual arbitration *assures* vindication of rights. Thus, a recent analysis of *Concepcion* concludes that:

> [T]he unconscionability defense in *Concepcion* "stood as an obstacle," for preemption purposes, because it was a categorical rule that applied to all consumer cases. The sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis.

Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 651 (2012).

Even a leading federal appellate decision applying *Concepcion* to bar a challenge to a class-action ban acknowledged that *Concepcion* rested largely upon the view that "although the *Discover Bank* rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases ...." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011).

By contrast, the Second Circuit's decision in this case does not place bilateral arbitration off-limits for any broad category of cases. Only when a plaintiff has met the demanding burden of proving that an arbitra-

tion agreement will not permit it to present a substantive claim in arbitration will the Second Circuit's standard render the arbitration agreement unenforceable. The proof demanded by the effective-vindication standard is not a "malleable" or "toothless" requirement that effectively allows "any party" to demand class proceedings in a broad range of cases. *Concepcion*, 131 S. Ct. at 1750. Moreover, while *Concepcion* suggests that the FAA does not allow invalidation of a class-action ban merely because some plaintiffs may "have insufficient *incentive*" to vindicate their rights, it leaves open a challenge where plaintiffs "have no effective *means* to vindicate their rights." *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012).

Finally, the decision below is not vulnerable to condemnation on the ground that it has a "disproportionate impact" on arbitration or is incompatible with "fundamental attributes of arbitration." *Concepcion*, 131 S. Ct. at 1748. Although the Second Circuit's decision contemplates that class procedures or other means of spreading costs of litigation will sometimes be required to ensure effective vindication of nonwaivable rights, and in those instances arbitration will be unavailable, that result will not undermine the FAA's policy favoring arbitration, as that policy does not endorse using arbitration to require parties to forgo substantive rights. By *allowing* arbitration under parties' agreements *except* when it would eliminate nonwaivable rights, the decision below maintains the most fundamental attribute of arbitration under the FAA: Arbitration is a choice of forum, not a waiver of substantive claims.

IV. American Express's Contention That Arbitration Benefits Employees and Consumers Does Not Justify Enforcement of Arbitration Agreements That Do Not Permit Vindication of Rights.

American Express does not seriously contend that the plaintiffs in this case can pursue their antitrust claims through individual arbitration under the clause at issue without incurring ruinous expenses. Nonetheless, American Express argues that the arbitration clause should be enforced because, it contends, arbitration procedures are generally beneficial to litigants. In particular, American Express contends that individual claimants in employment and consumer arbitrations fare as well as or better than comparable plaintiffs in traditional litigation and generally face low expenses of arbitration. *See* Pet. Br. 52.

The success (or lack of success) of employees and consumers in arbitration has very little bearing on this case, which involves an antitrust claim brought by commercial entities against another commercial entity under an arbitration clause that differs markedly from the agreements subject to the "consumer protective" rules that American Express discusses. Pet. Br. 51. The costs faced by consumers and employees who arbitrate claims, and their rates of success, say nothing about whether the antitrust claims at issue can viably be pursued under an arbitration agreement that permits neither collective proceedings nor other forms of cost-spreading.

Moreover, the "[e]mpirical evidence" American Express cites (Pet. Br. 52) concerns outcomes in cases that were actually pursued in arbitration. Those are, by definition, cases where the terms of the applicable

arbitration agreements did not effectively prevent the plaintiff from even pursuing her particular claims. In this case, the plaintiffs do not contend that an arbitrator would be biased against them or unlikely to rule for them on the merits if they were able to proceed in arbitration; rather, they contend that the terms of the arbitration agreement are such that it is not viable even to pursue their claims in individual arbitration because the costs would inevitably dwarf any potential recovery. Success rates of plaintiffs under agreements that do not impose such impediments do not in any way shed light on the question whether the agreements at issue here prevent effective vindication of the claims in this case.

Moreover, the evidence that American Express cites as to the benefits of arbitration for employees and consumers is dubious, at best. For example, a more recent study of employment arbitration, using a broader set of cases than that available to the author cited by American Express (*see* Pet. Br. 52) showed that employees prevailed in a substantially lower number of cases in arbitration than in litigation, and that average awards to employees in arbitration were a small fraction of those in litigation. *See* Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, Disp. Resol. J., Oct. 2009, at 6, 8-11. The author concluded that "the overall picture shows a large gap in the average expected outcomes in arbitration and litigation." *Id.* at 10-11.

As for the empirical studies American Express cites concerning consumer arbitration, they are limited to a tiny set of cases in which arbitrations conducted by the American Arbitration Association (AAA) yielded final awards in 2007—only 301 cases.

See Pet. Br. 52, n.21. Given the ubiquity of arbitration agreements in consumer contracts, and AAA's national prominence as a provider of arbitration services, the tiny number of consumer cases actually handled in a year suggests that the arbitration process poses significant barriers to the assertion of consumer claims even if, in cases that surmount those barriers, consumers may succeed in winning some relief in AAA arbitration about half the time.

This case, however, does not require the Court to consider whether arbitration is suitable or advantageous for the broad range of consumer and employment cases, or even for commercial antitrust cases generally. Whatever the outcome of this case, arbitration will continue to be available in those cases in which it offers potential benefits for the parties—and, indeed, even those cases in which it may disadvantage plaintiffs relative to litigation—as long as the arbitration agreement does not operate as an effective waiver of a plaintiff's substantive claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-133

In The
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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STATEMENT OF INTEREST OF *AMICI*[1]

Public Justice, P.C. ("Public Justice") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate, governmental, and individual wrongdoing. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of defending access to justice for employees, consumers, and other persons harmed by corporate misconduct, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration.

Public Justice regularly represents workers and consumers in both individual and class actions, and its experience is that aggregate litigation often affords the only way to redress corporate wrongdoing where individuals by themselves lack the knowledge, incentive, or effective means to pursue their claims. Public Justice has challenged class and collective action bans throughout the country where they would effectively immunize the corporate drafter from lia-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

bility or prevent individuals from vindicating important rights.

AARP is a non-partisan, non-profit organization with a membership that helps people 50 and older have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. As the leading organization representing the interests of people aged 50 and older, AARP advocates to protect the health, safety, and financial security of older people.

AARP is greatly concerned about fraudulent, deceptive, unfair, and discriminatory corporate practices, many of which have a disproportionate impact on older people. AARP thus supports laws and public policies designed to protect people and to preserve the legal means for people to seek redress when they are injured by such practices. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools.

While many older people lose large amounts of money to such practices, many others lose relatively small amounts or are subjected to practices which violate statutes that provide low monetary remedies. These losses nevertheless are significant. Moreover, even small losses may accumulate into huge ill-gotten gains for corporations which may have thousands or even millions of customers, each subject to the same harmful practices. Meaningful protection in the marketplace requires access to effective redress through private litigation. Class action waivers in arbitration clauses can, in some cases, prevent the

effective enforcement of statutory remedies. Ineffective enforcement removes important incentives a business may have to avoid engaging in fraudulent, unfair, or deceptive practices. AARP is interested in the Court's ruling in this case because of the impact it will have if people are forced to forego the only effective remedies they have.

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions. AAJ is committed to the First Amendment value of providing access to courts for the redress of grievances and the Seventh Amendment value of dispute resolution through trials by juries. It is concerned that when people waive those rights in favor of arbitration they enter a system that resolves disputes, not one that precludes resolution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The legitimacy of arbitration as an institution depends upon one vital premise: that it provides a means for parties with valid legal claims to effectively vindicate their substantive rights. As the enforceability of arbitration clauses has expanded to encompass claims by weaker parties against parties drafting the clauses, this Court, lower courts, and pro-arbitration advocates have steadfastly maintained that arbitration is an acceptable substitute for court because it offers parties a meaningful opportunity to obtain relief. As this brief will establish, the premise that parties may "effectively vindicate" their rights

in arbitration encompasses an assurance that the process offers a meaningful, genuine opportunity for parties to obtain the relief provided in statutes.

Petitioners argue that the FAA requires enforcement of its individual arbitration clause despite the undisputed fact that, in this case, enforcement will result not in the individual arbitration of Respondents' federal antitrust claims, but in their elimination. While it is cloaked in innocuous and obfuscatory language, Petitioners' proposition will have radical consequences if it is adopted by the Court.

First, if the Court embraces Petitioners' position and severs the link between arbitration and effective vindication of rights, statutes intended by Congress to protect weaker parties against stronger parties will essentially be gutted. Small businesses might as well move to a different country where they no longer enjoy the protection of the antitrust laws. At the whim of an employer, workers could be required to prospectively waive their Title VII rights. Consumer protection laws such as the Truth in Lending Act could be silently, but inescapably, repealed by corporations with the stroke of a pen.

Second, if Petitioners' position prevails and arbitration clauses are held enforceable even where they eliminate parties' ability to effectively vindicate their rights, incalculable harm will be done to the institution of arbitration. The concept of arbitration as a forum where claims may be heard – as opposed to buried and disposed of without resolution – pervades every aspect of our legal system. Scholars characterize and justify arbitration as a forum where disputes

may be heard, fairly considered, and resolved. Academics, many of whom strongly favor arbitration and other forms of alternative dispute resolution, do not equate arbitration with exculpation or the sub-rosa repeal of statutes, but consistently describe it as a forum in which claimants with valid claims have a chance of prevailing that is at least as good as the one they would have in court.

If the Court abandons the historic requirement that arbitration must provide for effective vindication of rights, these longstanding intellectual and ethical justifications for arbitration will no longer be valid. Arbitration will transform from a consensual choice to move disputes to a different but equally fair forum into a mere exercise in power. Arbitration will be nothing more than a convenient way for stronger parties to immunize themselves from laws intended to protect weaker parties.

If the Court agrees to the use of arbitration as a means of indirectly, but inevitably, gutting statutes, the case for arbitration in the realm of public and political discourse will also erode. In the Halls of Congress and before regulatory agencies such as the Consumer Financial Protection Bureau, the defenders of arbitration repeatedly stress that it offers claimants a fair means of pursuing claims. Congressional witnesses testifying on behalf of the business community do not argue that the value of arbitration lies in its power to wipe away antitrust claims that would otherwise impair businesses' freedom to do whatever they want. To the contrary, pro-arbitration advocates stress that the system offers an efficient way for claims to actually be *heard* on their merits. If

the Court holds, as Petitioners ask, that an arbitration clause is enforceable even in the exceptional situation where the evidence establishes that enforcement would make it economically irrational and realistically impossible for the plaintiffs to vindicate their statutory rights, proponents of arbitration will no longer be able to justify it as a fair system.

Similarly, since the 1920's, courts assessing the validity of arbitration clauses have consistently acknowledged that the legitimacy of arbitration depends upon it offering parties a realistic means of pursuing their rights. This Court should not embrace Petitioners' suggestion that the effective vindication doctrine must be read as a formalistic notion that permits enforcement of thinly veiled exculpatory contract terms that undermine statutes. Instead, if the doctrine is to mean anything, it must be that arbitration is acceptable because of the promise that it offers meaningful, practical avenues for actually obtaining the substantive remedies made available in statutes. *Black's Law Dictionary* (9th ed. 2009) defines "effective" as "productive; achieving a result." If an arbitration clause is proven in a particular case to make it economically infeasible for parties to pursue their claims, that bars them from "achieving a result," and therefore prohibits them from effectively vindicating their rights as the Court has required.

Petitioners and their *amici* say many fine words about the policy favoring arbitration. But if they get their way here, their victory in this case will be short-lived. Transformed into an absolute bar to potentially valid claims, arbitration will be a wounded and weakened institution. I arbitration is detached

from the promise of a chance at effective vindication of rights, it will lose its legitimacy – and will need to be put to rest.

STATEMENT OF THE CASE

Amici adopt Respondents' Statement of the Facts, but will succinctly highlight a few specific facts to make their argument more clear.

The evidence showing that Respondents would not be able to effectively vindicate their rights under Petitioners' arbitration clause was undisputed before the district court. In the trial court, where parties must raise or risk waiving their factual arguments, Petitioners never bothered to controvert facts and testimony offered by Respondents establishing that it is not possible to prosecute their tying claim under the Sherman Act without at least one detailed market study. Petitioners neither deposed Respondents' expert witness nor introduced their own. Because the testimony was uncontroverted, the Second Circuit specifically held in its first opinion in this case that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursed as individual actions, whether in federal court or in arbitration . . . ." *In re Am. Express Merchants Litigation (Amex I)*, 554 F.3d 300, 319 (2d Cir. 2009).

It is only before this Court that Petitioners have begun to quibble with Respondents' factual showing, suggesting that it is exaggerated. *E.g.*, Petitioners' Brief at 32-33. But the only sworn testimony in this

case shows that the median plaintiff's claim is worth a maximum of $5,252 and that the minimum costs of proceeding – in an individual case – are several hundred thousand dollars. To put Petitioners' quarrels about the evidence in context, even if one makes the unwarranted and extraordinarily conservative assumption that the minimum costs testified to by the *only expert* before the district court were exaggerated by a factor of three, the evidence would *still* show that the plaintiffs would have to advance costs of more than 20 times the amount they could conceivably hope to recover if they won their case.

ARGUMENT

Enforcement of Arbitration Clauses that Prevent Parties From Effectively Vindicating Their Substantive Statutory Rights Would Strip Arbitration of Any Legitimacy.

I. The Scholarly and Historic Understanding is that Arbitration Provides a Meaningful Forum for Pursuing and Vindicating Claims.

Scholars have consistently justified arbitration as a forum for adjudication – an alternative to courts in which claims can be heard and decided by neutral decisionmakers. In one of the leading treatises on arbitration, Thomas Carbonneau explains that, "arbitration gives meaningful effect to the constitutional guarantee of due process and equal protection. It guarantees that the parties will be heard and have an equal opportunity to make their case." Thomas E.

Carbonneau, *The Law and Practice of Arbitration* 38 (3d ed. 2009). Each of the three leading treatises on domestic arbitration describes arbitration as a viable alternative to trial adjudication, an idea that has been uncontroversial for decades but which Petitioners' theory would undermine. *See id.* (arbitration is an "informal procedure for the adjudication of disputes" that "functions as an alternative to conventional litigation"); 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 1:1 (3d ed. 2011) (hereinafter "Domke") ("Arbitration . . . involves a final determination of disputes [and] has elements of the judicial process. . . . [It] coexists with court procedure as an adjunct and part of the American system of administering justice."); 1 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 2.6.1 (1994) ("Arbitration is a form of adjudication because the parties participate in the decisional process by presenting evidence and reasoned arguments to an arbitrator whose final decision should be responsive to the dispute as presented."). "Adjudication" necessarily means that the process permits parties with valid claims to actually have those claims heard by a decisionmaker. The "adjudication" envisioned by these arbitration scholars is incompatible with the regime advocated by Petitioners, in which statutory claims may be practically erased so long as certain formalities are followed.

A number of scholarly articles on the topic of arbitration likewise stress the "adjudicatory" nature of arbitration. *See, e.g.*, Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 Ohio St. J. on Disp. Resol. 157, 158 (1989) ("[A]rbitration is a private ad-

judicatory process invoked as an alternative to filing a lawsuit."); William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. Legal Stud. 235, 235 (1979) ("[E]ven today much adjudication is private (commercial arbitration being an important example)."); Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DePaul L. Rev. 431, 431 (2010) ("[A]n agreement to arbitrate transfers disputes whose natural venue is a court to an arbitral tribunal, which does the work of courts . . . [and] retains adjudication's judgment rendering function."); Paul R. Verkuil, *Privatizing Due Process*, 57 Admin. L. Rev. 963, 983 (2005) (describing arbitration as "an alternative to judicial decisionmaking").

Although arbitration occurs in a private forum, its legitimacy rests in its promise that parties' claims will be fairly heard and resolved on their merits, just as if they had been adjudicated in a court. Domke, *supra*, at § 1:1 ("Despite differences between court litigation and arbitration proceedings, certain common principles of justice must be maintained."). Carbonneau explains that arbitration upholds due process concerns because it "provide[s] access, legal representation, hearings, equal and fair treatment of the parties, and a final and enforceable opinion." Carbonneau, *supra*, at 38. *See also* Domke, *supra*, at § 29:1 ("the parties to an arbitration . . . have the absolute right to be heard and to present evidence"); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 365 (1978) (arbitration participants must have "an opportunity to present proofs and reasoned arguments").

Central to this concept of arbitration serving as an alternative to court that upholds participants' rights is the assurance that the arbitrator will ultimately issue a decision on the merits. Domke emphasizes that arbitration "involves a final *determination* of disputes" using "elements of the judicial process." Domke, *supra*, at § 1:1 (emphasis added). The notion that parties are entitled to a "determination" of their disputes in arbitration runs counter to Petitioners' argument that an arbitration clause should be enforced even where parties would never be able to actually go through the arbitral process. *See also* Fuller, *supra*, at 387 ("We tend to think of the judge or arbitrator as one who decides and who gives reasons for his decision.").

One theme underlies these scholars' work: they all emphasize the idea that arbitration entails a neutral decisionmaker who will reach a decision on the merits based on evidence and arguments presented by the parties. There is not even a whiff of suggestion that arbitration is a roadblock that prevents parties from moving forward with their claims. In other words, the ability to vindicate one's rights is one of the hallmarks of arbitration.

II. Advocates for Arbitration Have Consistently Argued that It Offers an Opportunity to Vindicate Rights.

Proponents of arbitration – from members of Congress to members of the business community – have unswervingly touted arbitration as a perfectly adequate (and often superior) alternative forum for the vindication of substantive claims. Their argu-

ments, like those of the academics, assume that parties can actually pursue their substantive statutory rights in this alternative forum – not that arbitration clauses require parties to forfeit the right to bring their claims in any forum *at all*. As one vocal advocate whose firm specializes in drafting consumer contracts for banks put it, arbitration is a "valuable and significant way of making sure that everyone has access to justice." *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?: Hearing Before the Subcomm. on Commercial & Admin. Law, House Comm. on the Judiciary*, 110th Cong. 111 (2007) ("2007 House Judiciary hearing") (statement of Mark Levin, partner, Ballard Spahr Andrews & Ingersol).

U.S. Senators and Representatives assessing whether Congress should take action on arbitration have likewise emphasized that the central requirement of private arbitration is that parties have the opportunity to bring their claims, be heard, and effectively vindicate their rights. For example, in a recent hearing before the Senate Judiciary Committee, Senator Cornyn said, "I think we would all agree that not only must a process for dispute resolution be fair in fact but that there has to be an appearance of fairness, too, for people to have confidence in the outcome." *Arbitration: Is It Fair When Forced?: Hearing Before the Senate Comm. on the Judiciary*, 112th Cong. 18 (2011) ("2011 Senate Judiciary hearing") (statement of Sen. John Cornyn, Member, Sen. Comm. on the Judiciary). The Senator extolled the "positive societal good" of arbitration, emphasizing that, "[w]e need to provide an opportunity for people to have a forum that is fair and involves efficient

resolution of disputes." *Id.* at 20-21. Arbitration, he said, is just that forum. Senator Cornyn did not speak of avoiding or eliminating disputes, but instead of a forum where disputes may be heard and fairly resolved. Representative Cannon characterized the arbitration system as a "classic" means for "those wishing not to bring their dispute before Federal or State courts," noting that it can "afford justice" and beneficially resolve disputes. 2007 House Judiciary hearing, *supra*, at 2 (statement of Rep. Chris Cannon, Member, Subcomm. on Commercial & Admin. Law, House Comm. on the Judiciary).

Pro-business advocates, likewise, have defended arbitration on the ground that, "when you go to arbitration, you are not losing your substantive claims." *Id.* at 43 (statement of Mark Levin). Appearing on behalf of the U.S. Chamber of Commerce, Victor Schwartz testified that arbitration "allow[s] individuals to make their case"; that "[i]n many instances, [arbitration] agreements provide parties with the only realistic opportunity to obtain relief"; and that when parties "in the real world weigh the costs and benefits of pursuing a claim, . . . the ability to get resolution" through arbitration "can make a difference." 2011 Senate Judiciary hearing, *supra*, at 46. A prominent pro-arbitration law professor similarly emphasized that arbitration is about parties "actually being able to present their claim to a neutral decision maker." *Id.* at 97 (statement of Chris Drahozal, John M. Rounds Professor of Law, Univ. of Kansas School of Law).

"[A]rbitration agreements are fair," advocates have underscored, "because there is a dynamic pres-

ently in place that ensures fairness . . . ." 2007 House Judiciary hearing, *supra*, at 43 (statement of Mark Levin). The reason we can all trust arbitration's fairness, according to pro-arbitration witnesses, is that arbitration clauses are policed by the courts. As one advocate testified, "If a court rejects an arbitration agreement, that . . . shows that due process is working . . . ." *Id.* at 112. *See also* 2011 Senate Judiciary hearing, *supra*, at 161 (statement of Victor Schwartz) ("[E]xisting law prevents businesses from drafting arbitration agreements that tilt the playing field in their direction."); *id.* at 47 (Arbitration has "rigorous standards to help ensure fair results.").

The Chamber of Commerce itself, appearing before this Court, has embraced the core premise that arbitration is supposed to *ensure* that parties can proceed with their claims. Arbitration, the Chamber maintained, "offers a virtual guarantee that there will be a hearing on the merits." Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner at 14, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 721691, at *14 (quotation and citation omitted).

The Chamber also extolled the important role of courts in assessing the circumstances of each case to determine whether a particular clause would prohibit a party from going forward. Urging the Court to hold that a class action was "not necessary" for the consumer plaintiff in *Bazzle* to vindicate her rights, *id.* at 6, the Chamber argued:

> *[W]hether individual arbitration is prohibitively costly is a case-by-case question.* The answer to that question will vary depending on the claimant's circumstances, the institutional rules governing the arbitration, and the provisions of the applicable agreement. . . [T]he courts of appeals have been fleshing out the precise contours of the claimant's burden to prove that arbitration would be prohibitively expensive.

Id. at 7 (emphasis added, citations omitted).[2]

In sum, even the most adamantly pro-arbitration lobbyists, legislators, and business groups acknowledge that a rule requiring the enforcement of arbitration clauses that prevent parties from pursuing valid claims would go too far.

III. FAA Jurisprudence Is Rooted in the Core Premise that Arbitration Must Provide a Realistic Possibility of Vindicating Rights.

In keeping with the above, and most important, courts – including this Court -- have consistently justified arbitration as a procedural forum where claims

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[2] Notably, the Chamber now opposes the "case-by-case" approach it endorsed in *Bazzle*. In the present case, the Chamber argues instead that the FAA does *not* "authorize courts to condition enforcement of arbitration provisions on a case-by-case assessment of whether class-wide procedures may be necessary to enable plaintiffs to vindicate their statutory claims." Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioners at 6, *Am. Express Co. v. Italian Colors Rest.*, No. 12-133 (U.S. Dec. 28, 2012).

may be heard on their merits, not a mechanism for barring claims altogether. As then-Judge Cardozo explained about New York's arbitration statute of 1920, from which the FAA was derived, "Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921).[3] In other words, Justice Cardozo's point was that arbitration is not supposed to change the underlying substantive law – the definition of what is right and wrong – or to legalize previously illegal conduct, but instead is a forum for applying (not evading) the law. This Court invoked the core premise that arbitration is only acceptable where the parties have a meaningful opportunity to prevail on valid statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (agreements to arbitrate are enforceable under the FAA only "so long as the prospective litigant effectively may vindicate its

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[3] One of the primary drafters of both the New York Act and the FAA was Julius Henry Cohen. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 n. 7 (2008). In his seminal law review article explaining the Act, Cohen noted, "When the agreement to arbitrate *is* made, it is not left outside the law. Proceedings under the new arbitration law are as much a part of our legal system as any other special proceeding or form of remedy." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 279 (1926). Cohen's point is plainly that arbitration is supposed to offer a different forum, but *not* strip parties of the protections of substantive law, and leave parties "outside the law." Cohen's article has been repeatedly cited by members of this Court as key to understanding the FAA's legislative history. *E.g., Southland v. Keating*, 465 U.S. 1, 26 n.10 (1984) (O'Connor, dissenting).

statutory cause of action in the arbitral forum"). While the parties have already debated the meaning of *Mitsubishi Motors* at some length, and these *amici* do not intend to retread that ground, there is one crucial point to be made here. The Court in *Mitsubishi Motors* did not articulate a formalistic test under which arbitration clauses that preclude claimants from pursuing their claims are enforceable as long as they sound fine on paper. Instead, the Court stressed that arbitration clauses must provide a way for parties to "effectively" vindicate their statutory rights, not as an abstraction, but in a manner where nothing of substance is lost – so that "the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. In other words, for arbitration to have legitimacy, it must "ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638.

Outside the arbitration context, the Court has recognized that if parties are restricted to a single forum for conflict resolution, they cannot then be barred – either expressly or in effect – from accessing that forum. In *Boddie v. Connecticut* the plaintiffs could not afford to pay the state-imposed court fees and costs required to bring an action for divorce. 401 U.S. 371, 372 (1970). The evidence in the record – which, as here, was undisputed – established that the practical effect of enforcing the law would be to "effectively bar" the litigants from relief by denying them access to *any forum* in which they could bring their claims. *Id.* at 372-73. The Court held that the law was unconstitutional: "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a

cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id.* at 380.

Admittedly, neither Petitioners nor Respondents have raised constitutional issues in this case. However, the principle at stake here is identical to that in *Boddie*. The uncontroverted evidence shows that enforcement of Petitioners' individual arbitration clause will effectively bar small businesses with valid federal antitrust claims from pursuing their claims in the only forum provided to them. If the Court adopts Petitioners' position, a private arbitration clause that operates to bar parties from access to all forums for dispute resolution will be perfectly enforceable, while the same action by a governmental body would be unconstitutional. This result would sharply conflict with the Court's arbitration jurisprudence, which has steadfastly upheld arbitration as an equal (if not superior) forum to court – not as a bar to bringing claims. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (in arbitration, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). If Petitioners' rationale is accepted, it will no longer be possible to view arbitration as equal to court with respect to providing parties with a meaningful opportunity to vindicate their substantive rights.

Petitioners' position, if adopted by the Court, would also entail discarding the robust body of law that has developed as lower courts applied the Court's teachings that arbitration must provide for

the vindication of substantive rights. In *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit explained that the purpose of an arbitration contract "was to provide [the claimant] with an arbitral forum that would allow him to pursue his statutory rights." 317 F.3d 646, 680 (6th Cir. 2003). The appeals court rightly declared that if that purpose was impaired by some operation of the contract, it "would undermine confidence in the integrity of arbitration as a legitimate forum for the vindication of public claims." *Id.*

Courts have consistently applied the effective vindication principle to cases like this one, striking down clauses where the costs that a party would have to advance to pursue its claims under the terms of a particular arbitration clause were proven to actually exceed the amount the party stood to recover. *E.g.*, *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571, 574 (N.Y. App. Div. 1998) (striking term that would require consumer to advance non-refundable $4,000 arbitration fee, where fee exceeded value of most Gateway products and would "surely serve[] to deter the individual consumer" from pursuing his claim); *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (invalidating clause that would require purchaser of used mobile home to pay over $2,000 in arbitration fees to arbitrate $1,500 claim); *cf. Phillips v. Assocs. Home Equity Servs.*, 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (refusing to enforce arbitration clause that would require consumer to pay a $4,000 filing fee, half of the arbitrators' fees, travel expenses, hearing room rental, and costs, to arbitrate her Truth in Lending Act claim, which was "likely to be at least twelve times what it currently costs to file a case in federal

court"). The reasoning behind each of these cases is that the arbitration clauses in them barred claimants from actually being able to pursue their claims. *See, e.g., Jones v. Fujitso Network Commc'ns, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (refusing to enforce term that would have required employee fired for requesting medical leave to pay up to $7,000 to pursue his claim in arbitration because it would "substantially limit[] the use of the arbitral forum.").

If the Court adopts Petitioners' proposed new rule that arbitration clauses need only offer parties the chance to *hypothetically* vindicate their substantive statutory rights while in reality requiring claimants simply to forfeit those rights, arbitration will lose its legitimacy as an institution. To see how corrosive it would be for the Court to sanction such a degradation of the standards for enforcing arbitration clauses, one need only recall the cases in which courts held that forums *labeled* "arbitration," but which were rigged in a way that claimants would not be able to pursue their disputes in a fair system, do not even qualify as "arbitration" at all. *E.g., Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) ("The parties agreed to submit their claims to arbitration – a system whereby disputes are fairly resolved . . . . By creating a sham system unworthy . . . of the name of arbitration, Hooters completely failed in performing its contractual duty."). While Petitioners' arbitration clause lacks the more flamboyantly unfair aspects of the clause at issue in the *Hooters* case (such as allowing a party to the dispute to be the arbitrator), a dispute resolution process requiring a small business to expend costs 20 times greater

than the amount in dispute is every bit as exculpatory as the one at issue in *Hooters*.

In short, courts (including this Court) and the authorities often relied upon by courts have routinely and consistently endorsed the notion that arbitration is only legitimate and acceptable where it offers parties a meaningful opportunity to effectively vindicate substantive statutory rights. Petitioners seek to eliminate that opportunity and, in so doing, the legitimacy of arbitration.

CONCLUSION

This is an extraordinarily important case. Petitioners ask the Court to do something radical – to hold that the FAA mandates enforcement of arbitration clauses even in those limited circumstances where the clauses are proven through the admissible evidence to prevent parties from effectively vindicating substantive statutory rights. Petitioners' proposal would change the underlying statute from the Federal Arbitration Act to the Federal Corporate Immunity Act, and would rob it of its legitimacy. If the Court endorses the idea of arbitration as a means of immunity from the law, as a means of gutting substantive statutes, then the Court will do incalculable damage to the institution of arbitration itself.

Respectfully submitted,

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